Petition

81-987

No.

Office - Supreme Court, U.S.
FILED
NOV 25 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

WRIGHT LINE, a Division of WRIGHT LINE, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board's reliance on an employer's earlier statements, anti-union but legal, in the context of a union election, as "relevant background" evidence of discriminatory intent in a later unfair labor practice proceeding, contravenes the First Amendment and the requirement of Section 8(c) of the Labor Management Relations Act that the expression of such views "shall not . . . be evidence of an unfair labor practice."

2. Whether an employer can be held to have violated Section 8(a)(3) of the Labor Management Relations Act for discharging an employee, when the General Counsel fails to prove that an impermissible reason was the dominant motive behind the decision to discharge.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
1. The Decision Below Conflicts With the Decisions of This Court and of Other Courts of Appeals and Plainly Violates the Express Provisions of the First Amendment and Section 8(c) of the Act	8
2. The Decision Below Conflicts With the Act and This Court's Decisions Regarding the Standards to Be Applied in Discriminatory Discharge Cases Where Mixed Motives Are Alleged	11
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:	Page
Associated Press v. NLRB, 301 U. S. 103 (1937)	15
Broyhill Company, 210 NLRB 288 (1974)	12
Colletti's Furniture, Inc. v. NLRB, 550 F. 2d 1292 (1st Cir. 1977)	12
Florida Steel Corp. v. NLRB, 587 F. 2d 735 (5th Cir. 1979)	11
Gould Inc. v. NLRB, 612 F. 2d 728 (3d Cir. 1979), cert. denied sub nom. Moran v. Gould Corp., 449 U. S. 890 (1980)	14
Local 357, International Brotherhood of Teamsters v. NLRB, 365 U. S. 667 (1961)	15
Midwest Regional Joint Board, Amalgamated Clothing Workers of America v. NLRB, 564 F. 2d 434 (D. C. Cir. 1977)	14
Mt. Healthy School District v. Doyle, 429 U. S. 274 (1977)	6, 14
Neptune Water Meter Co. v. NLRB, 551 F. 2d 568 (4th Cir. 1977)	14
NLRB v. Aero Corporation, 581 F. 2d 511 (5th Cir. 1978)	13
NLRB v. Ayer Lar Sanitarium, 436 F. 2d 45 (9th Cir. 1970)	16, 17
NLRB v. Brown, 380 U. S. 278 (1965)	15
NLRB v. Colvert Dairy Products Company, 317 F. 2d 44 (10th Cir. 1963)	9, 10
NLRB v. Gissel Packing Co., 395 U. S. 575 (1969)	8, 11
NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937)	12
NLRB v. Lowell Sun Publishing Co., 320 F. 2d 835 (1st Cir. 1963)	10, 13
NLRB v. Nevis Industries, Inc., 647 F. 2d 905 (9th Cir. 1981)	13
NLRB v. Publishers Printing Co., 625 F. 2d 746 (6th Cir. 1980)	12
NLRB v. Rockwell Manufacturing Co., 271 F. 2d 109 (3d Cir. 1959)	11
NLRB v. Whitin Machine Works, 204 F. 2d 883 (1st Cir. 1953)	13

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Pelton Casteel Inc. v. NLRB, 627 F. 2d 23 (7th Cir. 1980) .. 12

Texas Department of Community Affairs v. Burdine, 450 U. S. 248 (1981) 14, 15

Waterbury Community Antenna Inc. v. NLRB, 587 F. 2d 90 (2d Cir. 1978) 14

Western Exterminator Co. v. NLRB, 565 F. 2d 1114 (9th Cir. 1977) 13

Other:

U. S. Const. Amend. I ..... i, 3, 8, 9

5 U. S. C. § 556(d) 14

28 U. S. C. § 1254(1) 2

29 U. S. C. § 158(a)(1) 8

29 U. S. C. § 158(a)(3) ..... i, 3, 4, 6, 11, 14

29 U. S. C. § 158(c) ..... i, 3, 8

29 U. S. C. § 160(c) 3, 13, 14

29 U. S. C. § 160(e) 6, 7

H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 53-4 (1947) 13

H. R. Rep. No. 245, 80th Cong., 1st Sess., 42-43 (1947) 13

No.

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OCTOBER TERM, 1981

WRIGHT LINE, a Division of
WRIGHT LINE, INC.,*

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Wright Line, a Division of Wright Line, Inc., respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on September 21, 1981.

* Wright Line, Inc. is a wholly owned subsidiary of Barry Wright Corporation.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 108 L. R. R. M. 2513 and at 92 Lab. Cas. ¶ 12,987. The opinion of the National Labor Relations Board and that of the Administrative Law Judge are reported at 251 NLRB 1083. All of the opinions below are appended.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1981. The court denied a timely petition for rehearing on October 16, 1981. On October 22, 1981, the court stayed its mandate pending application to this Court for a writ of certiorari, and directed that the petition be filed by November 23, 1981. Petitioner invokes this Court's jurisdiction under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . .

United States Code, Title 29:

§ 158(a)(3).

> (a) It shall be an unfair labor practice for an employer—
>
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

§ 158(c).

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

§ 160(c).

> . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .

STATEMENT OF THE CASE

Petitioner Wright Line discharged Bernard Lamoureux after it discovered that he had falsified inspection reports, and after he lied to management when confronted with the falsifications. Lamoureux claimed that he had been discharged because he was a union adherent and charged his employer with a violation of Section 8(a)(3) of the National Labor Relations Act. The General Counsel of the National Labor Relations Board filed a complaint alleging a violation, and at the hearing in the matter sought to demonstrate that Lamoureux had really been fired because of his vigorous support for the union in two previous unsuccessful campaigns to unionize Wright Line's plant.

At the hearing before the Administrative Law Judge (the "ALJ"), the evidence showed that Wright Line manufactures high quality sheet metal computer products which form storage systems for the computer industry. Quality control is an extremely important part of the manufacturing process, and was at the time under the direct supervision of Frank Forte, who was required to attest personally to the products' conformance with the rigorous specifications of the various government agencies for whom Wright Line produced the products. (T. 393-398; 448).[1] Because of the volume of production, Forte relied on shop inspectors, including Lamoureux, to perform most of the actual visual inspections.

Shop inspectors were to monitor parts constantly and to record both the time and the results of their inspections on Daily Activity Sheets. The time of the inspections was to be recorded accurately within a five-minute leeway, to enable Wright Line both to gauge staffing needs and to evaluate employee performance.

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1. Such references are to the transcript of the hearing before the ALJ.

On December 29, 1977, Lamoureux was observed entering the men's room with a newspaper. Forte remained in the general area around the men's room and determined that Lamoureux took more than half an hour before returning to his work station. (T. 399-400). Later that same day, when he sought to distribute literature describing Wright Line's dental plan, Forte was again unable to locate Lamoureux for nearly half an hour. (T. 401-403). The next day, as he undertook his customary review of the Daily Activity Sheets, Forte discovered that Lamoureux had reported inspections for times Forte knew Lamoureux could not have been actually inspecting. (T. 406-409). Forte concluded that he "didn't feel [he] could trust" what Lamoureux was reporting, and he told his superiors that he didn't want Lamoureux working for him. (T. 407-8).

As a result of Forte's statement, management prepared the documents necessary to discharge Lamoureux and called him in to permit him to explain. (T. 513-14). At first, Lamoureux denied that he had not made the inspections at the times set forth in the sheets. When Forte disputed that assertion, Lamoureux admitted not performing the inspections at the times set out in the sheets. However, except to say that he had spent time in the men's room, Lamoureux refused to say what he was doing out of his work area. (T. 514-15). Accordingly, Wright Line discharged Lamoureux.

There is no question that falsification of production reports fell into a category of offenses that warranted immediate discharge under Wright Line's written Rules of Conduct (other offenses provided for one or two warnings prior to discharge). (T. 412). However, at the hearing, the General Counsel contended that the rules violation was not the only reason that Wright Line discharged Lamoureux; the General Counsel claimed that Wright

Line really wanted to rid itself of a union supporter. Among other things, the General Counsel offered the employer's statements in vigorous opposition to two unsuccessful union election campaigns, one of which had recently concluded, to demonstrate "anti-union animus." Though not contending or concluding that the statements themselves were coercive or otherwise violative of the Act, the ALJ, the National Labor Relations Board and the court of appeals all relied on those statements as "relevant background" in deciding that anti-union animus had motivated Wright Line in substantial part.

In adopting the ALJ's recommendation that it find a violation of Act, the full Board reviewed the "disagreement and controversy" over the appropriate standard in cases of mixed motivation, which it characterized as "rampant" among the courts of appeals. (Appendix, p. A35). The Board rejected the requirement articulated in the First and Ninth Circuits that where convergent reasons for a discharge exist, the Board weigh those motives to determine the dominant one. Instead, it adopted wholesale the analysis created by this Court for the First Amendment context in *Mt. Healthy School District v. Doyle,* 429 U. S. 274 (1977). Accordingly, the Board held that upon a showing that forbidden reasons had been "a substantial factor" in the decision to discharge, Wright Line had the burden of proving that Lamoureux would have been discharged in any event. Relying in substantial measure upon what it called the "tone" of Wright Line's campaign, the Board concluded that anti-union animus had been a factor in Wright Line's decision. The Board then concluded that the employer had failed to meet its burden to disprove the causal relationship; the Board found a violation of Section 8(a)(3) and ordered Lamoureux's reinstatement with back pay. Pursuant to Section 10(e) of the National Labor Relations Act, 29

U. S. C. § 160(e), the Board petitioned the court of appleas to enforce its order.

The court of appeals approved the Board's standard setting the level of motivation necessary for a violation of the Act. While the court of appeals refused to assign to the employer the burden of persuasion, it did allocate to Wright Line the burden of producing evidence that the proper reason was the real reason for the discharge. Determining from its own review of the record that the General Counsel had met his burden of persuasion, the court of appeals enforced the Board's order. On motion by Wright Line, the court of appeals stayed its mandate pending this petition for certiorari.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of This Court and of Other Courts of Appeals and Plainly Violates the Express Provisions of the First Amendment and Section 8(c) of the Act.

Section 8(c) of the Labor Management Relations Act (the "Act") provides that the expression of any views, argument or opinion "shall not constitute *or be evidence of* an unfair labor practice" so long as the expression contains neither threat nor promise in violation of Section 8(a)(1). (emphasis added). This is a rule of law compelled by the First Amendment; anything less would make a federal violation of political expression. As this Court stated in *NLRB v. Gissel Packing Co.*, 395 U. S. 575, 617 (1969):

> [A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8(c) . . . merely implements the First Amendment by requiring that the expression of "any views, argument or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1).

Therefore, while it was largely unnecessary to include such a provision, in 1947 Congress nonetheless took the trouble to write this into the terms of the Act. By making this section an express part of national labor policy, Congress plainly intended to emphasize the importance of creating the balance necessary to assure that employees deciding whether to unionize make a fully in-

formed decision. Congress was making it clear that no other goals of the Act should be permitted to dampen the free and vigorous debate which must attend such a contest.

For the campaign which precedes representation elections, the "Act provides both affirmative rights and prohibited acts governing the conduct of both management and union. Each is accorded the right of persuasion and denied the use of coercion." *NLRB v. Colvert Dairy Products Company,* 317 F. 2d 44, 46 (10th Cir. 1963). To assure that the proper balance between the two exists, Congress saw fit not only to state what follows inexorably from the First Amendment—that the non-coercive expression of views cannot constitute a violation of federal law—but to provide that such expression *shall not be evidence* in any unfair labor practice proceeding. Whether such a prohibition is constitutionally required to prevent a chilling of the employer's right of free speech need not concern us here, for Congress wrote it into the Act.

Wright Line made it plain in two successive union organizing drives that it believed its employees would be better off without the union. No one charged that its campaign statements threatened, coerced or improperly promised benefits. Indeed, the Court of Appeals assumed that these campaign statements were completely lawful. App. at A16 n. 14. Nonetheless, the Board and the Court of Appeals were willing to consider these statements in determining whether Wright Line held the requisite discriminatory intent when it fired Lamoureux:

> The incidents cited, whether lawful or not, do not prove that Lamoureux was discharged because of his union activity. But they do show that the company knew of his activity and was displeased by it; they

> thus provide a relevant background for analyzing the circumstances of the discharge.
>
> App. at A16, n. 14.

In the same footnote, the court quoted with approval an earlier decision in the First Circuit which held that anti-union statements "plainly within [management's] rights . . . do lend a significance to otherwise ambiguous events when the question is whether a given course of conduct was actuated by anti-union animus." *Id.*, n. 14, quoting *NLRB v. Lowell Sun Publishing Co.*, 320 F. 2d 835, 840 (1st Cir. 1963). In short, the court and the Board were willing to make—and did make—these protected statements probative of an unfair labor practice. Whether they relied on them as "background" or primary ground,[2] it seems plain that they ran afoul of the Act.

At least three circuit courts of appeals have held squarely to the contrary. In *NLRB v. Colvert Dairy Products Company, supra*, the Court of Appeals for the Tenth Circuit refused to enforce a Board order that relied on an employer's campaign statements as "background evidence" in appraising its later conduct. As the court pointed out:

> Management cannot effectually attempt lawful persuasion if by so doing there is an ever-present penalty of "anti-union animus" for inherent in every campaign that is strenuously but lawfully waged is the expressed resistance to the views and claims of the opponent.
>
> 317 F. 2d at 46.

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2. The record makes it clear that the ALJ, whose recommendations the Board adopted, placed much importance on the employer's campaign statements in evaluating conduct which was otherwise ambiguous and in evaluating the credibility of the witnesses. See, e.g., App. at A55-A56; A67.

The Court of Appeals for the Third Circuit held the same in *NLRB v. Rockwell Manufacturing Co.*, 271 F. 2d 109 (3d Cir. 1959), refusing to enforce a Board finding based on a management speech in a campaign:

> The Board's attempt to hoist by its own bootstraps, so to say, its findings that the statements were violative of the Act by reason of the respondent's hostility to the union as evidenced by the general manager's speech must be assessed in view of its holding that the speech was "privileged" and not violative of the Act.
>
> 271 F. 2d at 118.

Accord, Florida Steel Corp. v. NLRB, 587 F. 2d 735, 752 (5th Cir. 1979). The express language of the Act compels this result. In ignoring the Act, the First Circuit was not only clearly incorrect, its decision conflicts with this Court's decision in *Gissel* and the rule in at least three other circuits. Finally, we note that means and level of proof in these cases lies in an area which the Board has acknowledged is "fundamental to the Act." App. at A35. A writ should issue to resolve this important question.

2. The Decision Below Conflicts With the Act and This Court's Decisions Regarding the Standards to Be Applied in Discriminatory Discharge Cases Where Mixed Motives Are Alleged.

In this case, the Board sought to resolve a long-standing dispute concerning the requisite level and burden of proof in cases where the Board charges a violation of the Act under Section 8(a)(3), on the ground that an employer has disciplined or discharged an employee "because of" union activity. As the Board noted:

> [T]he conflict over which test to apply in dual motive cases has now spread throughout the circuit courts to

> the extent that a review of the tests currently applied by the Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency.
>
> App. at A32.

The problem has two aspects. First, what level of anti-union motivation must enter into the employer's decision before it violates the Act? Second, who has the burden of showing that this level was or was not reached? On both of these critically important issues, the Board and the courts of appeals have been in complete conflict.

Over the years, the various courts of appeals adopted at least three different levels of motivation as the standard required by the Act. Until *Wright Line*, the Board applied what it termed the "in part" test. *E.g., Broyhill Company*, 210 NLRB 288, 296 (1974). Under this test, if an improper reason was in the employer's mind, whether or not there was also a legitimate reason for the discharge, the Board found a violation of the Act. Many courts of appeals enforced these orders. *E.g., NLRB v. Publishers Printing Co.*, 625 F. 2d 746, 749 (6th Cir. 1980); *Pelton Casteel Inc. v. NLRB*, 627 F. 2d 23, 27 (7th Cir. 1980).

On the other hand, many courts of appeals rejected this standard, which gave so little deference to an employer's rights and legitimate need to be free to manage its own business, including the fundamental "right to select its employees or to discharge them." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937). The Court of Appeals for the First Circuit consistently required that the improper reason for the discharge be the "real" or "dominant" motive for the challenged decision.[3] As the court explained, the Act requires the Gen-

3. Beginning with *Colletti's Furniture, Inc. v. NLRB*, 550 F. 2d 1292 (1st Cir. 1977), the First Circuit retreated from this standard toward the "but for" standard, which it adopted in this case.

eral Counsel to demonstrate that an employee's union activity "weighed more heavily in the decision to fire . . . than did dissatisfaction with his performance." *NLRB v. Whitin Machine Works*, 204 F. 2d 883, 885-6 (1st Cir. 1953). Weighing the motives is necessary to maintain the balance between management and employee rights that the Act mandates. As Judge Aldrich put it, concurring in *NLRB v. Lowell Sun Publishing Co.*, 320 F. 2d 835, 842 (1st Cir. 1963):

> [I]t is always easy, no matter how valid a proper cause for discharge may have existed, to say that "one" of the motives was the [anti-union] animus, [with the result that] a militant union man would feel that he could safely behave as he chose.

This problem was very much in the Congressional consciousness when in 1947 it amended Section 10(c) to require that the Board predicate its unfair labor practice findings on a "preponderance of the testimony" rather than "all the testimony" in the Wagner Act. H. R. Rep. No. 245, 80th Cong., 1st Sess., 42-43 (1947); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 53-4, 56 (1947). The Court of Appeals for the Ninth Circuit also consistently required that the Board show the impermissible motive to be the predominant one where two or more motives exist. *E.g., Western Exterminator Co. v. NLRB*, 565 F. 2d 1114, 1118 n. 3 (9th Cir. 1977); *but see, NLRB v. Nevis Industries, Inc.*, 647 F. 2d 905 (9th Cir. 1981). The Court of Appeals for the Fifth Circuit articulated a similar standard. *NLRB v. Aero Corporation*, 581 F. 2d 511, 514-15 (5th Cir. 1978) (a violation exists if "the force of antiunion purpose was 'reasonably equal' to lawful motive").

A third level of motivation lies between the "in part" and "dominant motive" standards, although the Board

equated it with the "dominant motive" test in its decision here. This third test is the "but for" standard, by which an action partially motivated by improper reasons is a violation only if the discharge would not have taken place without the improper motive. In fact, it is a threshold requirement that has found expression in almost all the circuits, including those where the "in part" test has been enforced. *Waterbury Community Antenna, Inc. v. NLRB*, 587 F. 2d 90, 98 (2d Cir. 1978); *Gould Inc. v. NLRB*, 612 F. 2d 728 (3d Cir. 1979), *cert. denied sub nom. Moran v. Gould Corp.*, 449 U. S. 890 (1980); *Neptune Water Meter Co. v. NLRB*, 551 F. 2d 568 (4th Cir. 1977); *Midwest Regional Joint Board, Amalgamated Clothing Workers of America v. NLRB*, 564 F. 2d 434, 440 (D. C. Cir. 1977). The "but for" threshold incorporates the same logic which guided this Court in *Mt. Healthy School District v. Doyle*, 429 U. S. 274 (1977).

With its decision in *Wright Line*, the Board has converted the "but for" threshold into the entire standard for evaluating motives under Section 8(a)(3). It purports to adopt *Mt. Healthy* (a first amendment case) in its entirety.[4] If an improper motive is found actually

4. In adopting the *Mt. Healthy* test, the Board also shifted to the employer the burden of proving by a preponderance of the evidence that the decision would have taken place irrespective of the impermissible factor. Under the Board's decision here, once an improper reason is shown to have been present in the mind of an employer, then the employer must prove a lack of causal relation. 251 NLRB at 1087. This wholesale adoption of a doctrine created to protect constitutional rights is inappropriate in the statutory context. It plainly violates the requirements of Section 10(c) of the Act that the Board find violations only on a preponderance of the evidence, and the provision of Section 7(d) of the Administrative Procedure Act that "the proponent of a rule or order has the burden of proof." 5 U. S. C. § 556(d). *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U. S. 248

to have played a necessary part, however small, in the employer's decision, the Board will find a violation. In other words, as the Board put it:

> It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.
>
> App. at A44-45, n. 14.

With its enforcement of the Board's order in this case, The First Circuit has fully retreated from the dominant motive standard to a "but for" requirement.

Both the intent of the Congress and this Court's decisions compel the use of a dominant motive standard in discriminatory discharge cases. This Court has repeatedly held that "it is the 'true purpose' or 'real motive' in hiring and firing that constitutes the test." *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U. S. 667, 675 (1961). *See also, NLRB v. Brown*, 380 U. S. 278 (1965); *Associated Press v. NLRB*, 301 U. S. 103, 132 (1937) ("what has been found to be real motive" is determinative). Such a determination necessarily requires the weighing and evaluation of convergent motives. In refusing to do so, the Board and the Court of Appeals have contravened the Act. A writ of certiorari should issue to correct this erroneous decision.

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3. (Cont'd.)

(1981) (burden of persuasion in Title VII cases always remains with plaintiff). While this issue was decided in Wright Line's favor in the court of appeals, the Board is not following it elsewhere. We mention the issue only to emphasize the importance and the far reaching significance of the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

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Appendix

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TABLE OF CONTENTS OF APPENDIX

	Page
Opinion of the United States Court of Appeals for the First Circuit	A1
Decision and Order of the National Labor Relations Board	A25
Decision of Administrative Law Judge Lowell Goerlich	A53
Order of the Court of Appeals Denying Petition for Rehearing	A80
Order of the Court of Appeals Staying Mandate Pending Application for Certiorari	A81

United States Court of Appeals
For the First Circuit

NO. 80-1721

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

WRIGHT LINE,
A DISIVION OF WRIGHT LINE, INC.,

RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

CAMPBELL, BOWNES and BREYER,
Circuit Judges.

Joseph A. Schwachter, Attorney, with whom *William A. Lubbers*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Howard E. Perlstein*, Attorney, were on brief, for petitioner.

William H. DuRoss, III, with whom *Gerard C. Smetana*, *Kovar & Smetana*, and *Julius Kirle*, were on brief, for respondent.

September 21, 1981

CAMPBELL, *Circuit Judge*. Bernard Lamoureux, an activist in the Teamsters' two unsuccessful campaigns to organize Wright Line's employees, was discharged from his job as a shop inspector, ostensibly because he submitted an inaccurate record of the times at which he performed inspections on December 29, 1977. Upon Lamoureux's complaint, the Board found that Wright Line had discharged him because of his union activity, in violation of section 8(a)(3) of the National

Labor Relations Act. The Board ordered Wright Line to reinstate Lamoureux with back pay. We enforce the Board's order.

I.

Wright Line manufactures computer storage products to the specifications of customers, including government agencies. Lamoureux began working for Wright Line in 1966 and, with the exception of a period between 1971 and 1973, was employed there continuously until his discharge on December 30, 1977. The Board found, with substantial record support, that Lamoureux's work, throughout this period until December 29, 1977 was satisfactory or better. For the last two years of his employment, he worked in the company's Inspection Department, inspecting completed parts for quality and conformity to specifications. This position required that he keep records on two forms: the Inspection Report, which stayed with the blueprint for the inspected part, and the Daily Activity Sheet, on which he recorded the time of each inspection and which he submitted to his supervisor after each day's work.

In 1976, Lamoureux contacted Teamsters Local 170 and initiated an organizational drive among Wright Line's employees. The Board supportably found that Lamoureux was visibly active in the union campaign. An election was held on August 27, 1976, and Lamoureux served as an alternative observer for the union, which lost the election. A second campaign was conducted in the fall of 1977, and Lamoureux was again active. An election was held on October 20, 1977; the union lost again. The Board supportably found that Wright Line management conducted an aggressive (although not necessarily unlawful) campaign against the union, and that management was well aware of Lamoureux's activism, certain supervisors having made "gratuitous remarks" to him about it.

The Board found, on the basis of substantial evidence, that Lamoureux's discharge occurred as follows: on the morning of December 29, 1977, Plant Superintendent Sc[illegible]ard asked Supervisor Forte to check on Lamoureux, reporting that he had seen Lamoureux entering the men's room carrying a newspaper. Forte went to Lamoureux's two assigned departments and walked between them until Lamoureux appeared some 35 minutes later. Forte then returned to his office, saying nothing to Lamoureux, and noted the times of Lamoureux's absence. Forte had made no attempt to locate Lamoureux, neither looking in the men's room nor using the plant's page system, although Lamoureux's job included several tasks which would require him to leave his departments for short periods. Later the same day, Forte had occasion to be in Lamoureux's department and did not find him there. About 30 minutes later he found Lamoureux at a workbench inspecting a part. Forte again made a record of the incident but did not ask Lamoureux to explain.

The next morning, Forte checked Lamoureux's Daily Activity Sheet and noted Lamoureux's report that he had made several inspections during the time when Forte had failed to find him in his departments. Forte presented this information to his own supervisor, who stated that this indicated a "dischargeable offense." The two consulted higher officials, who told them that they "could discharge" Lamoureux if his account substantiated the charge. Forte prepared a written report of the incident, had Lamoureux's final paycheck prepared, and then summoned Lamoureux to a meeting with himself and two others. Confronted with the charge, Lamoureux admitted that "the times weren't accurate and they never were," stating that "if you want them right to the second, I can put them right to the second," and asserting that the real reason for the confrontation was his union activity.

The supervisors denied this charge and discharged Lamoureux, saying that they no longer considered him trustworthy.[1]

II.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), provides that,

> (a) It shall be an unfair labor practice for an employer
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

This provision is supplemented by section 10(c) of the Act, 29 U.S.C. §160(c), which authorizes the Board to take remedial action, with the following limitation:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Section 8(a)(3) imposes a prohibition on employers which is simple to state but often difficult to apply in practice: they may not discharge an employee because of his union activity; but they may and should apply their usual rules and disciplinary standards to a union activist just as they would to any other employee. Hence, in a given discharge case it must be decided whether the employer acted because of the employee's union affiliation, or whether he acted because of some factor unrelated to the employee's union status. *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667, 675 (1961) (test is "true purpose" or "real motive").

Often, of course, there are competing explanations of why an employee was fired. Board counsel will point to evidence

[1] The Wright Line managers did not then and do not now contend that Lamoureux did not actually perform any of the inspections he reported. Their complaint was and is only that he "falsified" his report of the timing of his inspections.

of anti-union motivation. The employer will cite some instance of misconduct, and will deny having been motivated by any other consideration. In such a situation, the Board needs to determine not only whether the asserted misconduct occurred, but whether, even so, it effectively produced the discharge. The employer will doubtless lose if the asserted misconduct is shown not to have occurred. But suppose it occurred? In such event, Board counsel will argue that it was insufficient cause for discharge — that a non-activist would have been retained notwithstanding the offense. The employer, on the other hand, will deny this, and will insist, moreover, on his right, as the employer, to determine what conduct is or is not acceptable.

The Board's approach to these cases — sometimes, although without complete accuracy, termed "mixed motive" cases — has been the source of a continuing controversy among the circuits and between the Board and this court. In the present case, the Board has taken a new approach. Relying on *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and precedent from this circuit, the Board announced the following rule: general counsel must first "make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected conduct was a 'motivating factor' in the employer's [discharge] decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB No. 150, at 20-21. Applying that test here, the Board found that the prima facie case had been made and that Wright Line failed to prove that it would have taken the same action regardless of Lamoureux's union activity. Wright Line challenges the Board's new approach and its application here as contrary to the provisions of the statute and beyond the powers of the Board in that it places the burden of persuasion on the employer. We are thus called upon to pass on the val-

idity of the Board's new rule as well as on its application to this record.[2]

We start by observing that the Board's new rule seems better than its old one. Previously the Board would find a violation of section 8(a)(3) and order reinstatement whenever it concluded that the discharge was even partially motivated by opposition to union membership. Under this approach, a discharge was improper even if it would have occurred absent the illegal motivation, *e.g.*, the employee may have committed an infraction so serious that any employee — union or non-union — would have been fired. This partial motivation test — as the Board now acknowledges — placed "the union activist in an almost impregnable position once [anti-]union animus has been established." Activists could not be discharged for conduct that would be unforgivable in the case of another employee. The result was to immunize union activists against legitimate discipline for genuine offenses, and to deprive employers of the freedom to apply their own rules uniformly to all their employees. *See NLRB* v. *Wilson Freight Co.*, 604 F.2d 712 (1st Cir. 1979); *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979); *Liberty Mutual Insurance Co.* v. *NLRB*, 592 F.2d 595 (1st Cir. 1979); *Hubbard Regional Hospital* v. *NLRB*, 579 F.2d 1251 (1st Cir. 1978); *NLRB* v. *Rich's of Plymouth, Inc.*, 578 F.2d 880 (1st Cir. 1978); *Stone & Webster Engineering Co.* v. *NLRB*, 536 F.2d 461 (1st Cir. 1976); *NLRB* v. *Fibers International Corp.*, 439 F.2d 1311 (1st Cir. 1971); *NLRB* v. *Billen Shoe Co.*, 397 F.2d 801 (1st Cir. 1968); *NLRB* v. *Lowell Sun Publishing Co.*, 320 F.2d 835 (1st Cir. 1963).

In response to the Board's handling of these cases, we have repeatedly urged the Board to go beyond the employer's ob-

[2] Our review of the Board's factual findings is limited to determining whether they are supported by substantial evidence. 29 U.S.C. §160(e). But the Board's adoption of the *Mt. Healthy* test, to the extent that it establishes a new standard or set of legal presumptions, is a ruling of law which we review for legal error, giving due deference to the Board's expertise in interpreting the act it administers.

vious wish to be rid of an activist and to inquire into the question of actual cause, giving serious consideration to the employer's legitimate business reasons for discharging the employee. *See, e.g., NLRB* v. *Lowell Sun*, 320 F.2d at 841 (Aldrich, J., concurring) (employer's knowledge that discharge will have pleasing result not to be confused with actuating motive). We have expressed this concern by insisting that the Board find the protected activity to be the "dominant motive" for the discharge. *See, e.g., NLRB* v. *Fibers International*, 439 F.2d 1311; *NLRB* v. *Lowell Sun*, 320 F.2d 835 (Aldrich, J., concurring); *NLRB* v. *Whitten Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953) (reinstatement warranted if protected activity "weighed more heavily" than other factors); and cases cited in these opinions. Elaborating on the meaning of this test, we have held that the Board may order reinstatement only after finding that the discharge would not have occurred in the absence of the protected activity. *NLRB* v. *Fibers International*, 439 F.2d at 1312 n .1 & 1315.

The Supreme Court's decision in *Mt. Healthy* v. *Doyle*, 429 U.S. 274, followed by *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979), seemed to us to lend strong support to our analysis in the *Fibers International* case. In cases since *Mt. Healthy*, we have relied on its expression of the "but for" standard, abandoning our earlier "dominant motive" language. *Statler Industries, Inc.* v. *NLRB*, 644 F.2d 902 (1st Cir. 1981); *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979); *Colletti's Furniture, Inc.* v. *NLRB*, 550 F.2d 1292 (1st Cir. 1977). We came to recognize that the existence or not of a causal link between union activity and the employee's injury — or, as section 8(a)(3) puts it, the existence of anti-union "discrimination in regard to hire or tenure of employment" — was most accurately determined by asking whether the discharge would have occurred "but for" the protected activity, it is clear no unfair practice existed since a bad motive without effect is no more

an unfair labor practice than an unexecuted evil intent is a crime. While *Mt. Healthy* involved employee activity protected by the Constitution rather than by the NLRA, it presented issues of causation, harm and remedy very similar to those raised in the labor context, and the Court expressed the same concerns that we have voiced in labor cases.[3] The lower court in *Mt. Healthy*, like the Board in past labor cases, had ordered reinstatement on a finding that the protected activity was one of two reasons for the decision to discharge the employee. The Court's dissatisfaction with this result was exactly what ours had been: that the employee who engaged in protected conduct would thereby be placed in a better position than he would have held if he had not done so, and his employer's freedom to apply legitimate performance standards would be impaired by the activist's favored position. *Id.*, at 285-87. To avoid these results while protecting the employee's rights, the Court ruled that reinstatement should be ordered only upon a finding that the employee would not have been discharged but for the protected conduct. In labor cases, as in constitutional cases, we think the "but for" test is the correct substantive standard for evaluating the propriety of a resinstatement order.[4]

Wright Line does not appear to quarrel with this substantive test. Its challenge is to the Board's apparent adoption of *Mt. Healthy*'s allocation of the burdens of proof. *Mt. Healthy* held that once the plaintiff had shown his protected activity to have been a "substantial" or "motivating" factor, "the court should have gone on to determine whether the Board [of Edu-

[3] For discussion of the analogy between *Mt. Healthy* and section 8(a)(3) cases, see Michael S. Wolly, "What Hath *Mt. Healthy* Wrought," 41 Ohio State L.J. 385-99 (1980); and William H. DuRoss, "Toward Rationality in Discriminatory Discharge Cases: The Impact of *Mt. Healthy Board of Education* v. *Doyle* Upon the NLRA," 66 Georgetown L.J. 1109 (1978).

[4] We have applied the same subtantive test to evaluate a claim for reinstatement by an employee allegedly discharged in violation of the Age Discrimination in Employment Act. *Loeb* v. *Textron*, 600 F.2d 1003, 1019 (1st Cir. 1979).

cation] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.*, at 287. *See also Givhan* v. *Western Line*, 439 U.S. at 416. Wright Line contends, citing section 10(c) of the National Labor Relations Act,[5] the Board's regulation 101.10(b),[6] and section 7(c) of the Administrative Procedure Act,[7] that the Board lacks authority to place any burden of proof on the employer. Wright Line argues that these provisions require the board to prove the employer's guilt by a preponderance of the evidence, and that the Board's burden-shifting approach instead requires the employer to prove his innocence.

We have no difficulty accepting the Board's formulation that *some* kind of a "burden" devolves upon the employer once the general counsel has made a prima facie showing that protected conduct was a motivating or substantial factor in the discharge decision. 251 NLRB No. 150, at 20-21. Indeed, in *Statler Industries* v. *NLRB*, this court approved the general causation analysis expressed in the Board's *Wright Line* opinion. 644 F.2d at 905. On further reflection, however, we disagree with the Board on the narrow issue of defining the exact nature of the burden which the employer thus acquires. Section 10(c), as well as the Board's own regulation, make clear that the general counsel must prove the employer's guilt by a preponderance of the evidence to warrant a finding that

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[5] Section 10(c) of the National Labor Relations Act, 29 U.S.C. §160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

[6] 29 C.F.R. §101.10(b) provides in part:

> The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act.

[7] Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556, provides in part that "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

an unfair labor practice has occurred.[8] We think the only burden which may be acceptably placed on the employer is a "burden of production," that is a burden of coming forward with credible evidence to rebut or meet the general counsel's prima facie case. This, in effect, is the position we took recently in other cases although without actually characterizing

[8] The Board relies on *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967), in which the Court held that "once it has been proved that the employer engaged in discriminatory conduct which would have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *Id.*, at 34. *Great Dane*, which involved a challenge to an overall policy of the employer rather than to a single discharge, is inapposite here. Where an overall policy concededly does discriminate against protected activity, the Board must balance the employer's justification against the employee's interest, and it may fairly require the employer to demonstrate the genuineness and strength of its asserted business reason. But here the issue is whether the discharge was in fact discriminatory — whether it was caused by protected activity or whether some other factor was operative. *Great Dane* has no application. *See* L. Janofsky, "New Concepts in Interference and Discrimination under the NLRA," 70 Colum. L. Rev. 81, 96 (1970).

The Board also invokes the portion of section 10(c) quoted at the beginning of this section, regarding discharges for cause, citing Congress' rejection, in drafting this provision, of proposed language barring reinstatement unless the "weight of the evidence shows that such individual was not suspended or discharged for cause." H.R. 3020, 80th Cong., 1st Sess., §10 (1947). Quoting passages from debate on this provision, the Board argues that Congress intended to keep the burden of showing cause where Congress understood that it had been — on the employer. 93 Cong. Rec. 6677-78 (remarks of Senator Taft); 93 Cong. Rec. 7683 (remarks of Senator Ball). Wright Line argues, citing other passages of debate and quoting the Conference Report on the bill, that Congress did indeed intend to keep the burden where it was — on the Board. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947); 93 Cong. Rec. 6677-78 (colloquy between Senators Taft and Pepper). We find the legislative history as well as the statutory language inconclusive on the question of burden of proof. This provision of section 10(c) served to reaffirm the substantive standard that was already implicit in section 8(a)(3) and that we have repeatedly urged on the Board: reinstatement is not warranted if the discharge was actually the result of "cause" rather than of unlawful discrimination, even though "cause" might coincide with union activity to which the employer is hostile. *See NLRB* v. *Eastern Massachusetts Street*

the employer's burden as one of "production" rather than "persuasion." *NLRB* v. *Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981); *NLRB* v. *Cable Vision*, No. 80-1611, slip op. (1st Cir. Sept. 18, 1981). We said in those cases that once the general counsel has established a basis for finding an improper motive, the employer must merely, "come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation." *NLRB* v. *Amber Delivery Service*, 651 F.2d at 69; *NLRB* v. *Cable Vision*, slip op. at 13.

Professor Wigmore distinguishes between the burden of rebutting a prima facie case and the burden of persuading the trier of fact on the ultimate issue in a case by a preponderance of the evidence as follows:

> "[A] 'prima facie' case ... need not be overcome by a preponderance of the evidence, or by evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts back to the party having the burden of proof ...."

9 Wigmore on Evidence §2487, at 282 (3d ed. 1940), *quoting Speas* v. *Merchant's Bank & Trust Co.*, 188 N.C. 524, 125 S.E. 398 (1924).

Put another way, the general counsel's initial, prima facie showing creates a kind of presumption that an unfair labor practice has been committed. At this point, the employer risks losing his case unless he rebuts the presumption with evidence of his own. The Board may properly recognize this by stating that the employer (who alone has access both to the reason he

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Ry. Co., 235 F.2d 700, 709 (1st Cir. 1956) ("The purpose of this provision is to make it abundantly clear that the Board is not to interfere with the exercise by employees of their traditional right to discharge employees for adequate cause."). The question of burden of proof is addressed only in the "preponderance" language of the preceding sentence of section 10(c); that provision requires the general counsel to prove the violation by a preponderance of the evidence.

discharged the employee and any corroborative evidence) now comes under a "burden" to produce evidence of a "good" reason for the discharge. The imposition of this limited burden, however, does not shift to the employer the burden of proving that an unfair labor practice has not occurred. Rule 301 of the Federal Rules of Evidence very aptly describes the scope of the duty involved in rebutting presumptions in civil cases as "the burden of going forward with evidence to rebut or meet the presumption," and distinguishes this duty from "the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Fed. R. Evid. 301. Thus, the employer in a section 8(a)(3) discharge case has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel.

The Board may properly provide, therefore, that "Once [a prima facie showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB No. 150, at 20-21 (footnote omitted). The "burden" referred to, however, is a burden of going forward to meet a prima facie case, not a burden of persuasion on the ultimate issue of the existence of a violation.[9]

We recognize that the Supreme Court's language in *Mt. Healthy* appeared to place an affirmative burden of persuasion on the employer. We further recognize that this court's acceptance of *Mt. Healthy* in some previous cases may have sug-

[9] The Board appears to recognize that the general counsel must always establish the existence of an unfair labor practice by a preponderance of the evidence, but then confuses the issue by mislabeling the employer's burden as an "affirmative defense." 251 NLRB No. 150, at 18 n.11. The employer's duty, however, is merely a burden of producing rebuttal evidence and thus in no way resembles a true affirmative defense. Moreover, the Board's reference to its own "prima facie case" may suggest that the general counsel should prevail upon a showing of something less than a preponderance of evidence that the counsel's version of disputed facts is the true one. Let there be no mistake here either. The burden of persuasion on all issues of disputed fact rests at all times with the general counsel.

gested that we, too, saw the burden upon the employer as, in all situations, a burden of persuasion.[10] A closer look at *Mt. Healthy*, however, indicates a critical difference between that case and most labor cases. This difference does not affect the substantive utility of the "but for" analysis there employed, but does affect the nature of the employer's burden.

In *Mt. Healthy*, the employer conceded that he had fired the employee for speech activity which was later found to be fully protected under the first amendment. Thus, the "but for" test was not used, as it is in the typical labor case, as a part of the process of deciding whether a violation of protected rights had occurred. Rather, the "but for" test applied only *after* such a violation had been proven by the employer's own admission. The employer's claim, then, was a true affirmative defense to a rehiring order — *i.e.*, the employer contended that notwithstanding his violation of the Constitution reinstatement was improper as a remedy because the employee had also been involved in an altercation with another teacher, an argument with cafeteria employees, and an incident in which he made obscene gestures to female students. The employer argued that these incidents, which were totally independent of the protected speech activity, justified the employee's dismissal *notwithstanding* the fact that the employer had violated the employee's constitutional rights.[11] The employer's claim was

[10] *Statler Industries*, 644 F.2d 902 (1st Cir. 1981), for example, suggested that an employer in a section 8(a)(3) discharge case bears the burden of persuasion in proving that there would have been no discharge but for an employee's protected activity. *Id.*, at 905 n.4. On this narrow issue regarding the burden of proof, we disaffirm our previous ruling and adopt the analysis set forth in this opinion. Also, to the extent that *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979), can be read to impose a burden of proof on the employer, it, too, is hereby overruled. Nevertheless, we do hold that the Board is justified, after a prima facie showing by the general counsel, in requiring the employer to produce evidence showing "that it had a good reason, sufficient in itself, to produce the discharge." *Id.*, at 671.

[11] A similar claim might, on rare occasions, be raised in some labor cases. For example, where an employer fires a person for union activity, in clear violation of section 8(a)(3), but a few days later discovers the employee had,

thus a true affirmative defense which went to the appropriateness of the remedy being applied rather than to the existence of a violation in the first instance.

By contrast, in the typical labor case (and in the present case), the employer vigorously disputes the determining reason for the discharge. These cases therefore do not involve true affirmative defenses going to the appropriateness of the remedy, nor would the "but for" analysis be employed to determine the existence of such an affirmative defense. Rather, the "but for" test is in such cases a convenient formula for deciding whether or not an unfair labor practice has actually occurred — *i.e.*, for deciding if the determining motive of the discharge was anti-union animus or some valid business reason. The "but for" standard requires a determination by the Board, based on all the evidence, that, wholly apart from an alleged illegal motive, the employer would (or would not) have discharged the employee for the conduct ascribed to him by the employer. If the discharge would have taken place irrespective of the anti-union motive, no unfair labor practice took place, if the discharge would not have taken place, it is clear that the determining reason for the discharge was the protected activity, not

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unknown to anyone, been embezzling money, the employer may be justifiably required to prove, by a preponderance of the evidence, that a reinstatement order for his unfair labor practice is inappropriate. The employer there is not defending on the ground that the discharge was properly motivated, but rather on the theory that, notwithstanding the commission of an unfair labor practice, he should not have to take the particular person back. *Cf. NLRB* v. *Savin Business Machines Corp.*, No. 80-1645, slip op. at 7 (1st Cir. May 29, 1981) (employee's participation in robbery after unlawfully motivated discharge would have great bearing on right to reinstatement). It should be emphasized, however, that this is the rare case. Typically, employers and the general counsel point to the same or to related evidence and ascribe different inferences of motivation. In this more normal situation, the general counsel must prove, by a preponderance of the evidence, that the employer had an illegal motivation *and* that the employer would not have fired the employee anyway for a valid business reason.

the reason given by the employer.[12] With respect to this ultimate question of a determining causal link between the bad motive and the discharge, the burden of persuasion remains always with the general counsel. In the course of its inquiry, however, the Board and the ALJ are entitled to place a burden of production on the employer in the manner already described once a sufficient prima facie showing of illegal motive is made by the general counsel. *Cf. Texas Department of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214 (March 14, 1981) (stating that burden of persuasion on the issue of discriminatory intent in Title VII cases remains always with the plaintiff).

It may be said by way of concluding our discussion on this point, that labels concerning burdens of "persuasion" and "production" are not, as a practical matter, likely to be very important in most of these cases. Decision will usually turn on a weighing of all the evidence. But this weighing, under the Board's new formulation, will include a careful consideration of the employer's "good" reason as well as of the general counsel's evidence of improper motive. This approach will assure that due condiseration is given to all facets of the case.

III.

Applying these principles to Wright Line's discharge of Bernard Lamoureux, we find substantial evidence to support a conclusion by the Board, on the preponderance of the evidence, that Lamoureux was discharged because of his

[12] Our disagreement with the Board may reduce to this: the Board apparently feels that the Act is violated by a showing of anti-union sentiment in connection with a discharge. It would then impose an affirmative defense upon the employer to negate the violation. In our view, by contrast, the Act is violated only when an employer with anti-union animus discharges an employee he would not have fired "but for" the employee's union activity. We think that even employers who do not particularly like unions nevertheless comply with the law so long as they treat all their employees — union and non-union — alike.

union activity.[13] We therefore affirm the Board's finding that Wright Line violated the Act in discharging Lamoureux, and that Lamoureux is entitled to reinstatement with back pay.

As background to the discharge, the general counsel presented evidence that Lamoureux was a leading union advocate and that Wright Line management was aware of Lamoureux's role. The evidence showed that management was aggressive in its opposition to the union and that management's hostility was on occasion directed at Lamoureux in particular.[14] The general counsel also presented evidence of the

[13] Although the Board arrived at their conclusion by the use of a standard with which, in some respects, we disagree, we see no reason to remand this case for new findings. The ALJ in this case conclusively found that the company's alleged legitimate reason for discharging Lamoureux "has no validity at all" and "was false." There is substantial evidence to support these findings. Moreover, the company here, unlike the school boards in *Mt. Healthy* and *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979), did not allege a series of wholly distinct events, some of which were unrelated to protected activity and which might "admit of the argument" that the employer would have discharged Lamoureux despite his union activity. *Id.*, at 417 n.5. Thus, no remand is necessary in this case.

[14] There was testimony that the company distributed reproductions of newspaper articles derogatory to the Teamsters Union, including one article relating the murder indictment of an official of another Teamsters local. There was also evidence of a letter to employees in which the company president stated that Wright Line's "chances for survival and growth would be seriously hurt by the presence of a union," and evidence of three incidents during the 1977 campaign involving Lamoureux. On one such occasion, Supervisor Forte called Lamoureux to his office and charged him with "pressuring someone to vote union"; Forte later retracted the statement. On another occasion, Forte saw Lamoureux counting his pay and asked "What's that? Union campaign funds?" In a third incident, a foreman told Lamoureux that "Everybody knows you're the union kingpin." Wright Line contends that the Board's reliance on these incidents is improper, since the Board has not alleged that any of them involved an unfair labor practice by the company, and since some may involve expression protected by the first amendment. We have held, however, that anti-union statements "plainly within [management's] rights . . . do lend a significance to otherwise ambiguous events when the question is whether a given course of conduct was actuated by anti-union animus." *NLRB* v. *Lowell Sun*, 320 F.2d at 840. The incidents cited, whether lawful of not, do not prove that Lamoureux was discharged because of his union activity. But they do show that the company knew of his activity and was displeased by it; they thus provide a relevant background for analyzing the circumstances of the discharge.

circumstances surrounding the discharge itself. These circumstances, taken together and in the light of this background, support the Board's inference that the company was watching Lamoureux for any transgression that might provide an opportunity for discharge, and that it seized on Lamoureux's otherwise trivial offense to effectuate its true purpose of getting rid of an activist.

The evidence showed that Southard asked Forte to check on Lamoureux, who was entering the men's room with a newspaper, even though this conduct violated no company rule and even though Lamoureux had no history of laxity to warrant suspicion. Forte's "checking" consisted of measuring and documenting Lamoureux's absence; it did not include looking in the men's room or paging Lamoureux, even though Lamoureux's job was such that he might have been absent for a legitimate purpose. When Forte found Lamoureux after another absence later in the day, he did not ask for an explanation, although he apparently considered the absence significant enough to merit recording. From these facts, the Board could reasonably infer that Southard and Forte were primarily interested in building a case against Lamoureux rather than simply assuring that he attend properly to his work.

The events following Forte's review of Lamoureux's time report also support the inference of impropriety. Rather than confronting Lamoureux directly, as might be expected of a supervisor who discovers an apparent transgression by an otherwise satisfactory long-term employee, Forte immediately consulted higher officials. These managers' first response was that the offense was "dischargeable"; they made the decision to discharge Lamoureux even before discussing the matter with him. By the time Lamoureux was called in, Forte had prepared his final paycheck and drafted a memorandum for the file. When Lamoureux finally received a chance to explain, his defense apparently fell on deaf ears. He conveyed no inability or unwillingness to make accurate time reports;

rather his response suggested that he had not done so because he had not considered it important, and that he would do so if desired. Nevertheless, he was not warned or reprimanded, but discharged. From this and other evidence, mentioned hereinafter, the Board could reasonably infer that the inaccurate time report was seized upon to justify action taken for another reason.

This inference might have been overcome had there been evidence establishing that Wright Line would have fired employees in Lamoureux's position (whether or not union activists) for this sort of infraction. For example, it might have been proven that Wright Line was a consistently strict employer who commonly fired employees for rule violations no more serious than this, or else that this was in fact a violation very detrimental to its business which warranted discharge. Had this been done—had it been established that apart from union activity, Lamoureux would have been discharged for making such a time report—a finding for the employer would have been indicated. But no such conclusion was required on this record. Wright Line relies on its rule against "knowingly altering or falsifying production time reports."[15] It emphasizes its use of Daily Activity Reports to verify performance of inspections, to evaluate individual inspectors, and to monitor staffing levels. But the Board concluded, with ample support in the record, that the time of each inspection, as opposed to the fact that each was done and the number done in a day, had no bearing on any of these calculations and received no notice from management.

[15] The rule, which also prohibits falsifying "payroll records, or punching another employee's timecard without supervisory approval," provides that a first infraction "may" be punished by discharge or by any lesser disciplinary infraction, such as suspension or a warning. Of course, where an employer enforces a valid rule in an even-handed manner, there is usually no violation of the Act. *See Texas Instruments* v. *NLRB*, 637 F.2d 822 (1st Cir. 1981) (finding that employee violation of valid rule prohibiting disclosure of confidential information justified discharge because such activity is not protected by section 7).

Lamoureux testified, and the Board was entitled to believe, that he had never been instructed to record times exactly, that he had never heard of any employee being criticized for inaccurate reporting of times, and that the general practice among inspectors was to record times in "round figures." The Board could conclude from the evidence that Lamoureux's offense affected no significant interest of his employer, and no interest that Wright Line had treated as significant.[16]

Wright Line asserts that Lamoureux's "falsehood" proved him untrustworthy, and therefore unworthy of the reliance it must place on its inspectors. Clearly a showing of dishonesty would cause most employers to discharge an employee. The Board could reasonably doubt, however, that an employer would lose its trust in such a long term, satisfactory employee on the basis of an inaccuracy that cost the employer nothing and gained the employee nothing. Lamoureux's time report, under these circumstances, suggests no intention to falsify; at worst it demonstrates carelessness on a matter of little significance.

Further, the evidence showed that Wright Line's past practice in handling similar offenses had been quite different. The Administrative Law Judge found, based on testimony regarding the time required to perform inspections, that reports submitted by other inspectors contained "easily discernible" inaccuracies; yet no other inspector was ever disciplined in any way for inaccurate time reports. There was also evidence of an incident in which Wright Line's Chief Inspector had another employee punch her time card, a violation of the same rule. *See* note 15, *supra*. Even though such conduct strongly

[16] It is, of course, the employer's judgment of the importance of time records, and not the Board's judgment or our own, that matters. An employer is entitled to make and enforce his own rules, however foolish they may appear to the Board, as long as he does not base personnel decisions on union status. *See, e.g., Liberty Mutual Insurance Co.* v. *NLRB*, 592 F.2d at 603. Nevertheless, where the issue is what motivated a decision to discharge, the apparent insignificance of a particular rule, along with the employer's history of treating it as unimportant, support an inference that something more was involved than just a breach of that rule.

suggests deliberate falsification to cover an unexcused absence at the employer's expense, the Chief Inspector received only a warning; she was not discharged. There was evidence that Wright Line had discharged two employees for dishonesty, but both instances involved conduct amounting to outright theft from the company. One of these employees, an accountant, had embezzled funds, while the other, a salesman, had falsified his reports so as to collect unearned commissions. On this evidence, the Board was warranted in perceiving a difference between Wright Line's responses to Lamoureux's offense and its handling of comparable incidents of misconduct. The Board could reasonably infer from this that some other factor was involved in Lamoureux's case; and the background of Lamoureux's activism and the company's animus could be thought to supply the missing factor.

Further support for the Board's conclusion as to Wright Line's motivation comes from the ALJ's credibility judgments. To rebut the inference of improper motive, Wright Line presented the testimony of three of the officials involved in the discharge. Each related his own view of the incident, denying any concern for Lamoureux's "untrustworthiness," as shown by his false time report. The ALJ stated that, from the demeanor of the witnesses as well as from "the record as a whole," I do not believe that they were truthful in revealing the 'real reason' for Lamoureux's discharge." The ALJ's evaluation of Forte's testimony is particularly specific. He found that Forte appeared generally honest, until questioned about Lamoureux's discharge. "Here, being a generally truthful man, he showed physical signs of disassembling." The ALJ's credibility judgments must stand unless they are unreasonable, which these are not. Under these circumstances, the witnesses' untruthfulness strengthens the inference of unlawful motive. *Shattuck Denn Mining Corp.* v. *NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

On this record, the Board was justified in finding that the general counsel had proven, by a preponderance of the evidence, that Wright Line discharged Lamoureux because of his union activity, in violation of section 8(a)(3) of the Act.

The petition for enforcement is granted.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

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WRIGHT LINE, A DIVISION OF
WRIGHT LINE, INC.

and

BERNARD R. LAMOUREUX.

Case 1-CA-14004

August 27, 1980

DECISION AND ORDER

On October 27, 1978, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and counsel for the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings, and conclusions of

1. Respondent contends that the Administrative Law Judge's credibility resolutions, findings of fact, and conclusions of law stem from bias or hostility. We find no merit in this contention. There is no basis for finding that bias or partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N. L. R. B. v. Pittsburgh Steamship Company*, 337 U. S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Moreover, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

Respondent excepted, *inter alia,* to the Administrative Law Judge's conclusion that it violated Section 8(a)(3) and (1) of the Act when, on December 30, 1977, it discharged Bernard Lamoureux. We agree with the result reached by the Administrative Law Judge, but only for the reasons that follow.

In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1), it must be determined, *inter alia,* whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities. As discussed *infra,* various "tests" have been employed by the Board and the courts to aid in making such determinations. These tests all examine the concept of "causality," that is, the relationship between the employees' protected activities and actions on the part of their employer which detrimentally affect their employment.

The Administrative Law Judge's Decision in the instant case reveals some uncertainty regarding the appropriate mode of analysis for examining causality in cases alleging unlawful discrimination. Indeed, similar doubts

2. Respondent has excepted to the Administrative Law Judge's recommended broad cease-and-desist order. In our recent decision in *Hickmott Foods, Inc.,* 242 NLRB 1357 (1979), we held that such broad injunctive language is warranted only when a respondent has been shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Inasmuch as the instant violations do not meet this test, we shall modify the Administrative Law Judge's Order to require Respondent to refrain from violating the Act in any like or related manner.

as to the applicable test appear to have become widespread at various levels of the decisional process primarily as a result of conflict in this area among the courts of appeals and between certain courts of appeals and the Board.

After careful consideration we find it both helpful and appropriate to set forth formally a test of causation for cases alleging violations of Section 8(a)(3) of the Act. We shall examine causality in such cases through an analysis akin to that used by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U. S. 274 (1977).

It is our belief that application of the *Mt. Healthy* test [3] will maintain a substantive consistency with existing Board precedent and accommodate the concerns expressed by critics of the Board's past treatment of cases alleging unlawful discrimination. We further find the *Mt. Healthy* test to be in harmony with the Act's legislative history as well as pertinent Supreme Court decisions. Finally, in this regard, enunciation of the *Mt. Healthy* test will alleviate the confusion which now exists at various levels of the decisional process and do so in a manner that, we conclude, accords proper weight to the legitimate conflicting interest in this area, thereby advancing the fundamental objectives of the Act.

I. The Distinction Between Pretext and Dual Motive

It is helpful, initially, to distinguish between what are termed "pretext" cases and "dual motive" cases because it is in the dual motive situation where the legitimate inter-

3. For ease of reference, we shall refer to this test of causality as the *Mt. Healthy test.* We note, however, that *Mt. Healthy* itself does not constitute a construction of the National Labor Relations Act and, accordingly, our Decision here is not compelled by *Mt. Healthy.* We do not view *Mt. Healthy* as at odds with our previous construction of the Act.

ests of the parties most plainly conflict. Consequently it is in such situations that the existing controversy and confusion in this area are highlighted.[4]

In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.

The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. This existence of both a "good" and a "bad" reason for the employer's action requires further inquiry into the role played by each motive and has spawned substantial controversy in 8(a)(3) litigation.[5]

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4. As is demonstrated herein, under the *Mt. Healthy* test, there is no real need to distinguish between pretext and dual motive cases. The distinction is nonetheless useful in setting forth the controversy surrounding dual motive cases.

5. Unfortunately, the distinction between a pretext case and a dual motive case is sometimes difficult to discern. This is especially true since the appropriate designation seldom can be made until after the presentation of all relevant evidence. The concep-

II. The "In Part" Test

For a number of years now, when determining whether the Act has been violated in a dual motivation case, the Board has applied what is termed the "in part" causation test. In its present form the "in part" test provides that if a discharge is motivated, "in part," by the protected activities of the employee the discharge violates the Act even if a legitimate business reason was also relied on. *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574, 575 (1976). This "in part" analysis has taken various forms with the "in part" language being modified while the underlying concept remains intact. Thus, the Board has used the following terms in dual motivation cases: "the motivating or moving cause," *The Bankers Warehouse Company*, 146 NLRB 1197, 1200 (1964); "the motivating factor," *Tursair Fueling, Inc.*, 151 NLRB 270, 271, fn. 2 (1965); "the substantial, contributing factor," *Erie Sand Steamship Company*, 189 NLRB 63, fn. 1 (1971); "motivated principally," *P. P. G. Industries, Inc.*, 229 NLRB 713 (1977); "a substantial cause," *Broyhill Company*, 210 NLRB 288, 296 (1974); "a substantial or motivating ground," *KBM Electronics, Inc., t/a Carsounds*, 218 NLRB 1352, 1358 (1975); "in substantial part," *Central Casket Co.*, 225 NLRB 362 (1976).

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5. (Cont'd.)

tual problems to which this sometimes blurred distinction gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense. Thus, in a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a "dual motive" may exist and the issue becomes one of the sufficiency of proof necessary for the employer's affirmative defense to be sustained. Treating the employer's plea of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases. See *Bedford Cut Stone Co., Inc.*, 235 NLRB 629 (1978).

Since its inception, the "in part" test has been perceived by some to be, at least conceptually, at odds with the oft-repeated idea that:

> Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. [*N. L. R. B. v. MaGahey*, 233 F. 2d 406, 413 (5th Cir. 1956). See also *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). Compare *Shattuck Denn Mining Corporation v. N. L. R. B.*, 362 F. 2d 466 (9th Cir. 1966).]

A conflict between this concept and the "in part" rationale is seen because, in a dual motivation case, the employer does have a legitimate reason for its action. Yet, an improper reason for discharge is also present. Thus, the employer's recognized right to enforce rules of its own choosing is viewed as being in practical conflict with the employees' right to be free from adverse effects brought about by their participation in protected activities. Critics of the "in part" test have asserted that rather than seeking to resolve this conflict and accommodate the legitimate competing interests, the analysis goes only half way, in that once hostility to protected rights is found, the inquiry ends and the employer's plea of legitimate justification is ignored.

III. The Advent of the "Dominant Motive" Test and the Law of the Circuits

In recent years, various courts of appeals have become increasingly critical of the "in part" analysis. The earliest, most outspoken critic of the "in part" test has

been the First Circuit, which in *N. L. R. B. v. Billen Shoe Co., Inc.*, 297 F. 2d 801 (1st Cir. 1968), examined the Board's application of the "in part" analysis and found it lacking.[6] Fundamental to its rejection of the "in part" test is the court's view that the test ignores the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established.

In an effort to remedy what it viewed as the inequities of the test, the First Circuit began to advance its own process of analysis in dual motivation cases. Thus, in *Billen Shoe, supra*, the First Circuit stated that:

> When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus is not enough. [397 F. 2d at 803.]

In other opinions, the First Circuit has termed its test a "dominant motive" (see fn. 6, *supra*) or a "but for" test. *Coletti's Furniture, Inc. v. N. L. R. B.*, 505 F. 2d 1293 (1st Cir. 1977). For our purposes, this test will be referred to as the "dominant motive" test, which, in its most simple form provides that when both a "good" and "bad" reason for discharge exist, the burden is upon the General Counsel to establish that, in the absence of protected activities,

6. Actually, as early as 1953, in *N. L. R. B. v. Whitin Machine Works*, 204 F. 2d 883, 885 (1st Cir. 1953), that circuit court expressed disagreement with Board analysis in 8(a)(3) cases. Yet, it was not until 1963 that Judge Aldrich of the First Circuit formally initiated the "dominant motive" or "but for" test. See *N. L. R. B. v. Lowell Sun Publishing Co.*, 320 F. 2d 835, 842 (1st Cir. 1963).

the discharge would not have taken place. *Coletti's Furniture, supra* at 1293, 1294; *N. L. R. B. v. Fibers International Corporation*, 439 F. 2d 1311, 1312, fn. 1 (1st Cir. 1971).

Conflict between the Board and the First Circuit in this area has escalated to the point where in *Coletti's Furniture, supra* at 1293, the court stated that "[T]here can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule." In addition, the conflict over which test to apply in dual motive cases has now spread throughout the circuit courts to the extent that a review of the tests currently applied by the Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency.[7]

Thus, the District of Columbia Circuit, in *Allen v. N. L. R. B.*, 561 F. 2d 976, 982 (D. C. Cir. 1977), applied an "in part" test, stating that:

> [T]he cases are legion that the existence of a justiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity . . . ."[8]

7. Although it is responsible for the advent of the "dominant motive" test, which now is found in various forms in the circuits, the First Circuit, in its recent decision in *N. L. R. B. v. Eastern Smelting and Refining Corporation*, 598 F. 2d 666 (1st Cir. 1979), appears to have moved away from the "dominant motive" test as earlier expressed. In *Eastern Smelting*, the First Circuit articulated and applied for the first time the *Mt. Healthy* test set forth in this opinion. In *Eastern Smelting*, however, the First Circuit did not explicitly abandon its "dominant motive" test, nor did it abate its criticism of the "in part" test.

8. An "in part" test has also been applied by the Sixth, Seventh, and Tenth Circuits. See *N. L. R. B. v. Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-*

Several months later, another panel applied the "dominant motive" test as propounded by the First Circuit in *Billen Shoe, supra,* holding that:

> The burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one. [*Midwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. N. L. R. B.*, 564 F. 2d 434, 440 (D. C. Cir. 1977).] [9]

Similarly, the Ninth Circuit has applied both a "dominant motive" and an "in part" test.[10] Then, in *Polynesian Cultural Center v. N. L. R. B.*, 582 F. 2d 467, 473 (9th Cir. 1978), that court noted that:

> Several of our cases have said that the discriminatory motive must be the moving cause for the discharge. . . . On the other hand, this court has indicated that it too, on occasion, employs the but-for approach.

Tests which have been applied by other circuit courts fit neatly into neither the "in part" nor "dominant motive" category. For example, in *Waterbury Community*

8. (Cont'd.)

CIO, 570 F. 2d 586, 590 (6th Cir. 1978), cert. denied 439 U. S. 819; *N. L. R. B. v. Gogin, d/b/a Gogin Trucking*, 575 F. 2d 596, 601 (7th Cir. 1978); *M. S. P. Industries, Inc., d/b/a The Larimer Press v. N. L. R. B.*, 568 F. 2d 166, 173-174 (10th Cir. 1977).

9. This "dominant motive" test has also been applied by the Fourth Circuit. See *Firestone Tire and Rubber Company v. N. L. R. B.*, 539 F. 2d 1335, 1337 (4th Cir. 1976).

10. Compare *Western Exterminator Company v. N. L. R. B.*, 565 F. 2d 1114, 1118 (9th Cir. 1977), with *Penasquitos Village, Inc. v. N. L. R. B.*, 565 F. 2d 1074, 1082-83 (9th Cir. 1977).

Antenna, Inc. v. N. L. R. B., 587 F. 2d 90, 98 (2d Cir. 1978), the Second Circuit stated its test as follows:

> The rule of causation applied in this Circuit is that "the General Counsel must at least provide a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one." . . . The magnitude of the impermissible ground is immaterial . . . as long as it was the "but for" cause of the discharge . . . .

The Third Circuit stated in *Edgwood Nursing Center, Inc. v. N. L. R. B.*, 581 F. 2d 363, 368 (3d Cir. 1978), that:

> [T]he employer violates the Act if anti-union animus was the "real motive" . . . . If two or more motives are behind a discharge, the action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity. . . . On the other hand, if the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory. . . . Thus, if the employer puts forward a justifiable cause for discharge of the employee, the Board must find that the reason was a pretext, and that anti-union sentiment played a part in the decision to terminate the employee's job.

The Fifth Circuit, in *N. L. R. B. v. Aero Corporation*, 581 F. 2d 511, 514-515 (5th Cir. 1978), ruled that:

> [T]he Board is not required to establish substantial evidence that the conduct is motivated solely by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was "reasonably equal" to the lawful motive prompting conduct.

Finally, the Eighth Circuit has held that:

> [T]he mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity. [*Singer Company v. N. L. R. B.*, 429 F. 2d 172, 179 (8th Cir. 1970).]

We note that our citation of the foregoing cases is intended neither to explain nor vindicate the position expressed by any particular circuit court. Rather, it is intended to demonstrate that in an area fundamental to the Act, namely, Section 8(a)(3), disagreement and controversy are rampant among the various decisionmaking bodies.

IV. The Mt. Healthy Test

As the preceding two sections have demonstrated, the issue of what causation test is to be used to determine whether the Act has been violated in dual motivation cases is now in a position where some view the "in part" test as standing at one extreme, while the other extreme is represented by the "dominant motive" test first advanced by the First Circuit. Despite this perceived polarization, room for accommodation and clarification does exist in the test of causality set forth in the recent Supreme Court decision of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U. S. 274.

The *Mt. Healthy* case arose when Doyle, an untenured teacher, brought suit against the Mt. Healthy School Board, alleging that it had wrongfully refused to renew his contract. The school board presented Doyle with written reasons for their refusal. The two reasons cited were: (1) Doyle's use of obscene language and gestures in the shcool cafeteria, and (2) Doyle's convey-

ance of a change in the school's policies to a local radio station. In his suit, Doyle alleged that the refusal to renew his contract violated his rights under the first and fourteenth amendments. He sought reinstatement and backpay.

The district court found that of the two reasons cited by the school board, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and Doyle was, therefore, entitled to reinstatement and backpay. The court of appeals affirmed, *per curiam.*

The Supreme Court reversed. In a unanimous opinion, the Court rejected the lower court's application of such a limited "in part" test and ruled that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. The Court reasoned as follows:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vin-

> dicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But the same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correcteness of its decisions. [429 U. S. at 285-286.]

From this rationale, the Court fashioned the following test to be applied on remand:

> Initially, in this case, the burden was properly placed upon respondent [employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [429 U. S. at 287.]

Thus, the Court established a two-part test to be applied in a dual motivation context. Initially, the employee must establish that the protected conduct was a "substantial" or "motivating" factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct.

This test in *Mt. Healthy* is further explicated by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), a case decided the same day as *Mt. Healthy*. A brief discussion of *Arlington Heights* is helpful in examining the parameters of the *Mt. Healthy* test.

Arlington Heights involved an effort by a real estate developer to obtain a zoning change enabling it to construct a housing development. During the zoning hearing, it became apparent that the new development would be racially integrated. The Village ultimately denied the rezoning and, in response, a group brought suit seeking injunctive and declaratory relief alleging that the decision was racially motivated. The Supreme Court ruled that plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." (429 U. S. at 270.)

In reaching its decision, the Court invoked the *Mt. Healthy* test. Thus, the Court, citing *Mt. Healthy*, stated that:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. [429 U. S. at 270-271, fn. 21.]

The *Arlington Heights* decision is instructive in one other respect as well. For in its decision, the Court recognized that efforts to determine what is the "dominant" or "primary" motive in a mixed motivation situation are usually unavailing. In this regard, the Court stated that a plaintiff is not required

> to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. [429 U. S. at 265.]

Assuming for the moment that the *Mt. Healthy* test is applicable to dual motive discharges under Section 8(a)(3), it is evident that *Mt. Healthy* represents a rejection of an "in part" test which stops with the establishment of a *prima facie* case or at consideration of an improper motive. Indeed, rejection of such an "in part" test is implicit in the Supreme Court's reversal of the district court's application of such an analysis.

The "dominant motive" test fares no better under *Mt. Healthy*. While a surface similarity between *Mt. Healthy* and the "dominant motive" test exists in that both reject a limited "in part" analysis and both require proof of how the employer would have acted in the absence of the protected activity, the similarity ends there. For the *Mt. Healthy* test and the "dominant motive" test place the burden for this proof on different parties.

As has been noted, under the "dominant motive" test it is the General Counsel who, in addition to establishing a *prima facie* showing of unlawful motive, is further required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, it is made abundantly clear in *Mt. Healthy* (and was specifically reiterated in *Arlington Heights*) that after an employee or, here, the General Counsel makes out a *prima facie* case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate

that the decision would have been the same in the absence of protected activity. This distinction is a crucial one since the decision as to who bears this burden can be determinative.

The "dominant motive" test is further undermined by the *Arlington Heights* decision. As noted above, the Court in *Arlington Heights* eschewed the "dominant motive" analysis by specifically stating that it is practically impossible to examine a dual motivation decision and arrive at a conclusion as to what was the "dominant" or "primary" purpose or motive. *Arlington Heights*, 429 U. S. at 265. Finally, the shifting burden analysis set forth in *Mt. Healthy* and *Arlington Heights* represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation.

V. Application of the Mt. Healthy Test to Section 8(a)(3)

In the final analysis, the applicability of the *Mt. Healthy* test to the NLRA depends upon its compatibility with established labor law principles and the extent to which the test reaches an accommodation between conflicting legitimate interests. For, as the Supreme Court noted, in unfair labor practice cases:

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review. [*N.L.R.B. v. Truck Drivers Local Union. No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL*, 353 U. S. 87, 96 (1957).]

Initially, support for the *Mt. Healthy* test of shifting burdens is found in the 1947 amendment of Section 10(c). That amendment provided that:

> No order of the Board shall require the reinstatement of any individual as employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

While the amendment itself does not address the "in part" or "dominant motive" analysis or the allocation of burdens, the legislative history does. In explaining the amendment Senator Taft stated:

> The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board. [93 Cong. Rec. 6678; 2 Leg. Hist. 1595 (1947).]

The principle that "the employer has to make the proof" is also found in the Supreme Court's decision in *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U. S. 26 (1967). In that case the Court was concerned with the burden of proof in 8(a)(3) cases. It first noted that certain employer actions are inherently destructive of employee rights and, therefore, no proof of antiunion motive is required. Of course, the discharge of an employee, in and

of itself, is not normally an inherently destructive act which would obviate the requirement of showing an improper motive. In this context, the Court in *Great Dane* stated that:

> [I]f the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an anti-union motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus . . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [388 U. S. at 34.]

Thus, both Congress and the Supreme Court have implicitly sanctioned the shift of burden called for in *Mt. Healthy* in the context of Section 8(a)(3).[11]

Indeed, as is indicated by the above quotation of legislative history and the citation of *Great Dane,* the shifting burden process in *Mt. Healthy* is consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases, although the process has not been articulated formally in the manner set forth in *Mt. Healthy.* Similarly, it is the process used by the Board. Thus, the Board's decisional process traditionally has in-

11. It should be noted that this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense (see fn. 6, *supra*) to overcome the *prima facie* case of wrongful motive. Such a requirement does not shift the ultimate burden.

volved, first, an inquiry as to whether protected activities played a role in the employer's decision. If so, the inquiry then focuses on whether any "legitimate business reason" asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.[12] Thus, while the Board's process has not been couched in the language of *Mt. Healthy*, the two methods of analysis are essentially the same.

Perhaps most important for our purposes, however, is the fact that the *Mt. Healthy* procedure accommodates the legitimate competing interests inherent in dual motivation cases, while at the same time serving to effectuate the policies and objectives of Section 8(a)(3) of the Act. As the Supreme Court noted in *N. L. R. B. v. Erie Resistor Corp.*, 373 U. S. 221 (1963), it is fundamental in "situations present[ing] a complex of motives" that the decisional body be able to accomplish the "delicate task" of

> weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct [373 U. S. at 229.]

Mt. Healthy achieves this goal.

Under the *Mt. Healthy* test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided

12. The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case. See, e.g., *Shattuck Denn Mining Company v. N. L. R. B.*, 362 F. 2d 466 (9th Cir. 1966).

with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because it action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

Finally, we find it to be of substantial importance that our explication of this test of causation will serve to alleviate the intolerable confusion in the 8(a)(3) area. In this regard, we believe that this test will provide litigants and the decisionmaking bodies with a uniform test to be applied in these 8(a)(3) cases.[13]

Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[14]

13. Still an additional benefit which will result from our use of the *Mt. Healthy* test is that the perceived significance in distinguishing between pretext and dual motive cases will be obviated.

14. In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the

Finally, inherent in the adoption of the foregoing analysis is our recognition of the advantage of clearing the air by abandoning the "in part" language in expressing our conclusion as to whether the Act was violated. Yet, our abandonment of this familiar phraseology should not be viewed as a repudiation of the well-established principles and concepts which we have applied in the past. For, as noted at the outset of this Decision, our task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment. Indeed, it bears repeating that the "in part" test, the "dominant motive" test, and the *Mt. Healthy* test all share a fundamental common denominator in that the objective of each is to determine the relationship, if any, between employer action and protected employee conduct. Until now, in making this determination we frequently have employed the term "in part." But in so doing it only was a term used in pursuit of our goal which is to analyze thoroughly and completely the justification presented by the employer. It is, however, our considered view that adoption of the *Mt. Healthy* test, with its more precise and formalized framework for making this analysis, will serve to provide the necessary clarification of our decisional processes while continuing to advance the fundamental purposes and objectives of the Act.

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14. (Cont'd.)

effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

VI. Application of the Mt. Healthy Test to the Facts of the Instant Case

In the instant case, the General Counsel alleges that Respondent discharged Bernard Lamoureux in violation of Section 8(a)(3) and (1) of the Act. Respondent denies this allegation, asserting that Lamoureux was discharged for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." The Administrative Law Judge found that Respondent's discharge of Lamoureux violated Section 8(a)(3) and (1) of the Act. For the reasons set forth below, we agree.

The record reveals that at the time of his discharge Lamoureux had been employed by Respondent for over 10 years. He had occupied the position of inspector for 2 years and was considered a better than average employee. Indeed, at the hearing, his work was described as admirable. On the day prior to his discharge, Lamoureux's supervisor, Forte, was instructed by the plant superintendent to "check" on Lamoureux, who had been observed entering a restroom carrying a newspaper.[15] The next morning, Forte discovered certain discrepancies in Lamoureux's timesheet. The timesheet indicated that Lamoureux had been working on certain jobs at the time when Forte had been looking for him the previous day but had been unable to find him at his work station.[16] Upon reporting this finding to his own supervisor, Forte was told that "the offense was a dischargeable offense."

15. Respondent never contended that such conduct violated shop rules.

16. It was conceded that Lamoureux's work activities might legitimately have carried him to other parts of the plant. Nevertheless, Forte did not use the paging system to try to locate Lamoureux, or even check the men's room where Lamoureux was last seen.

Thereafter, Forte was instructed to ask Lamoureux for an explanation. Although Forte did so, the record reveals that Lamoureux's final check had already been prepared when Forte confronted him with the discrepancy. Respondent then rejected Lamoureux's explanation, in which he conceded that he may not have performed the jobs at the times indicated on his timesheet but maintained that the jobs had in fact been performed that day. Lamoureux was promptly discharged, purportedly for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." Respondent conceded that Lamoureux was not discharged for being away from his work station or for not performing his assigned work.[17]

In presenting his *prima facie* case of wrongful motive, the General Counsel demonstrated that Lamoureux had become a leading union advocate, beginning in 1976. During both the 1976 and 1977 election campaigns, both of which were lost by the Union, Lamoureux actively solicited support for the Union among his fellow employees. It is undisputed that Respondent was well aware of his sympathies and activities. Thus, during the 1977 campaign, which like the 1976 campaign appears to have included aggressive electioneering on both sides, Lamoureux was reprimanded by management, allegedly for pressuring an employee regarding the Union.[18] Also, dur-

17. In this connection, we note that Respondent did not seek to determine where Lamoureux had been when Forte discovered him absent from his work station, nor did Respondent seek to verify whether Lamoureux had, as he claimed, performed the inspections indicated on his timesheet. Rather, Respondent simply informed Lamoureux that he was no longer worthy of Respondent's trust.

18. Respondent's witness later conceded that the word "pressure" was too strong.

ing the 1977 campaign, Respondent's supervisors on several occasions directed gratuitous remarks regarding the Union toward Lamoureux, once calling him the "union kingpin." We also note that the discharge took place just 2 months after the 1977 election.

In addition, it can scarcely be disputed that Respondent harbored animus toward both the Union and union activists, including Lamoureux. Respondent's anti-union campaign included, *inter alia,* references to the murder indictment of an official of one of the Union's sister locals in another State, as well as an unsupported claim that Respondent's "chances for survival and growth would be seriously hurt by the presence of a union." In view of the tone of the campaign, along with Respondent's remarks directed specifically to Lamoureux, we agree with the Administrative Law Judge that Respondent displayed considerable animus toward Lamoureux, whom it considered to be the "union kingpin."

The General Counsel also demonstrated that Respondent never previously had discharged an employee under these circumstances, although, as detailed by the Administrative Law Judge, the record shows that employees commonly completely timesheets as Lamoureux had and that such discrepancies had no effect on the accuracy of the system of production control. It also appears that, of the only two other employees ever discharged for violating the rule regarding the falsification of company records, one was discharged for embezzlement and the other for deliberate forgery of sales records in order to collect fraudulent sales commissions.[19] Furthermore, two employees who had deliberately violated the same rule by falsifying their timecards were issued warnings and were not discharged.

19. Unlike these employees, it was conceded that Lamoureux could not have benefited financially from the discrepancies on his timesheet.

From the foregoing, we conclude that the General Counsel made a *prima facie* showing that Lamoureux's union activity was a motivating factor in Respondent's decision to discharge him. Our conclusion is based on Respondent's union animus, as reflected in the hostility directed toward Lamoureux resulting from his active role in the union campaign as well as the timing of the discharge, which occurred shortly after completion of the latest union election. Also of significance is Respondent's sudden and unexplained departure from its usual practice of declining to discharge employees for their first violation of this nature. Such action here is especially suspect in light of Lamoureux's admirable work record and the fact that his timesheet discrepancies neither inured to his benefit nor served to affect detrimentally Respondent's production control system.

We further find that Respondent has failed to demonstrate that it would have taken the same action against Lamoureux in the absence of his engaging in union activities. In this regard we note that the record discrepancies were only discovered by Forte following the plant supervisor's directive to "check" on Lamoureux, despite the fact that Respondent had no reason to believe that Lamoureux was untrustworthy. Under the circumstances, such actions suggest a predetermined plan to discover a reason to discharge Lamoureux and thus rid the facility of a union activist.[20] Further undermining Respondent's defense is the evidence which demonstrates disparate treatment. As noted previously, the only instances where discharge was imposed by Respondent as a result of "record discrepancies" were where the employee in question sought to embezzle funds or collect fraudulent sales commissions.

20. See, e.g., *Lipman Bros., Inc., et al.*, 147 NLRB 1342, 1376 (1964), enfd. 355 F. 2d 15, 21 (1st Cir. 1966).

Lamoureux's infraction clearly did not rise to such a level. Indeed, the record demonstrates that such record discrepancies were commonplace and generally resulted in no discipline whatsoever. In those instances where discipline was imposed, Respondent issued warnings or other forms of discipline short of discharge.

Accordingly, for the reasons noted above, we find that Respondent's discharge of Bernard Lamoureux violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wright Line, a Division of Wright Line, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER JENKINS, concurring:

I am willing to apply the shifting burden-of-proof standard my colleagues adopt for determining whether a discharge was caused by an unlawful purpose where the discharge may have had more than one cause, not all of them unlawful. This standard may suffice for most cases. However, there may remain a residue, perhaps

small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. All of them, both lawful and unlawful, may have combined to push the employer to the decision he would not have reached if even one were absent. In such cases, it is plainly not the latest event, the most recent purpose, which is the cause of the discharge; rather, it is all of them together, from earliest to latest, which cause the discharge.[21]

Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, then plainly the unlawful motive must be deemed to be part of the cause of the discharge, and the discharge is unlawful. By definition, it took all these straws to break the camel's back, so each of them provides a contribution "but for" which the camel would have survived. It is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by his venture into an area prohibited by the Act. Thus, the "in part" standard, as distinguished from the "but for" and "dominant motive" tests, is the only criterion which will effectuate the purposes of the statute. As my colleagues note, the legislative history shows plainly that Congress itself struck this balance, and I read *Mt. Healthy* as also in effect adopting this standard.

Thus, my only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, modification may be required.

21. It is the difficulty in singling out one individual cause in such situations which has led to criticism and rejection of a "but for" standard as a measure of cause; there is no logical way to apply a "but for" standard in such cases except to fasten upon the most recent event or motive. See Prosser, "Handbook of the Law of Torts" at 238-239, 4th ed. (1971); LaFave and Scott, "Handbook on Criminal Law," at 249-251 (1972).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by unlawfully discharging any employees or discriminating against them in any other manner with respect to their hire or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Bernard R. Lamoureux reinstatement to his former job or, if his job no longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired to replace him.

WE WILL restore his seniority and other rights and privileges and WE WILL pay him the backpay he lost because we discharged him, with interest.

WRIGHT LINE, A DIVISION OF
WRIGHT LINE, INC.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge: The charge filed by Bernard R. Lamoureux on January 3, 1978, was served on Wright Line, a Division of Wright Line, Inc., the Respondent herein, on January 4, 1978. A complaint and notice of hearing was issued on February 23, 1978. In the complaint it was charged that the Respondent unlawfully discharged Lamoureux on December 30, 1977, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein referred to as the Act.

The Respondent filed a timely answer denying that it had engaged in or was engaging in the unfair labor practices alleged.

The case came on for hearing at Boston, Massachusetts, on June 19 and July 10, 11, 12, and 13, 1978. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT,[1] CONCLUSIONS, AND REASONS THEREFOR

I. The Business of the Respondent

The Respondent is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Massachusetts.

At all times herein mentioned, the Respondent has maintained its principal office and place of business at 160 Gold Star Boulevard, in the City of Worcester and Commonwealth of Massachusetts (herein called the Worcester location), and is now and continuously has been engaged at said plant in the manufacture, warehousing, and distribution of accessory products for computer rooms to be purchased and transported in interstate commerce from and through various States of the United States other than the Commonwealth of Massachusetts, and causes, and continuously has caused at all times herein mentioned, substantial quantities of materials to be sold and transported from said plant in interstate commerce to States of the United States other than the Commonwealth of Massachusetts.

The Respondent annually ships materials valued in excess of $50,000 from its Worcester, Massachusetts, loca-

1. The facts found herein are based on the record as a whole and observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *N. L. R. B. v. Walton Manufacturing Company & Loganville Pants Co.*, 369 U. S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and out of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

tion to points outside of the Commonwealth of Massachusetts. The Respondent annually receives materials valued in excess of $50,000 at its Worcester, Massachusetts, location directly from points outside the Commonwealth of Massachusetts.

The aforesaid Respondent is and has been engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein referred to as the Union or Teamsters Local 170), is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Facts*

On August 27, 1976, and October 20, 1977, representation elections were conducted in Cases 1-RC-14576 and 1-RC-15338, respectively, at the Respondent's facility in a unit of "all production and maintenance employees, including warehousemen, truck drivers, tool-and-die room employees, new product department employees, and cafeteria employees employed by the Employer at its 160 Gold Star Boulevard and 150 Grove Street, Worcester, Massachusetts locations, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act." Teamsters Local 170, the only Union on the ballots, lost both elections. During both election campaigns, the Respondent opposed the Union and urged employees to vote against it. In the most recent campaign in 1977, the Respondent issued antiunion letters and leaflets to the employees. In pressing its intense antiunion campaign, the Respondent published reproductions of certain newspaper articles, derogatory of

the Teamsters, one of which displayed a picture of Anthony Provenzano in handcuffs with the caption "Teamster Provenzano Indicted in 1961 Murder."

Moreover, the Respondent couched its appeal in terms of survival, for it wrote its employees, "It is our firm belief, which by the way many of our loyal employees share with us, that Wright Line's chances for survival and growth would be seriously hurt by the presence of a union here . . . and with your NO vote, Wright Line in Worcester can continue on its competitive drive for survival in a very difficult industry." It is positive that the Respondent does not want the Union in its plant.

Lamoureux was the employee who first brought the union to the Respondent's plant in 1976. He "got things going as far as getting pledge cards, getting lieutenants to pass them out. And so forth." He attended union meetings and solicited union affection at the Respondent's plant. Lamoureux served as an alternate observer at the 1976 election. Lamoureux was as active in the second election as in the first except that he did not serve as an alternative observer. During the 1977 election campaign, Francis O. Forte, supervisor of quality control and time-study and Lamoureux's boss, called Lamoureux to Manager of Product Engineering Donald McCallum's office and charged him with having been seen "pressuring someone to vote union in the paint department." Lamoureux denied the accusation and stated if Forte persisted he would like a grievance form. Later Forte apologized and said that his use of the word "pressure" was too strong." On another occasion while Lamoureux was counting his paycheck money, Forte remarked, "What's that. Union campaign funds?" Shortly before the 1977 election Rudolph Tuoni, the maintenance foreman, said to Lamoureux, "Everybody knows you're the Union kingpin."[2]

2. This testimony was not denied.

Lamoureux was employed as an inspector and was assigned to departments 12 and 14 where he inspected pieces fabricated by the machines in these departments. The function of department 12, the forming department, was to "form bends and angles of the sheet metal parts." Department 14 "performs the operation of welding one or more sheet metal parts together to form components."[3] Lamoureux's job was (as explained by Lamoureux) "just to see that all manufactured items were within blueprint specifications, and through job experience there were a lot of other small area, such as fit and things like that, which were not on the blueprint."

When a machine was set up in either department 12 or 14[4] Lamoureux performed what was termed a first-piece inspection by which he determined whether the piece produced came up to the blueprint specifications. If it did not, production was not permitted until the piece passed inspection. When the inspector was not available, the setup man or the foreman was authorized to pass a first piece. After a favorable first-piece inspection was completed a written approval was endorsed on the "traveling inspection document [traveling inspection report] which goes with the blueprint for each job." In addition to first-piece inspections, Lamoureux also performed intermediate inspections of the fabricated piece while the machines were running in order to ascertain whether a variance from the specifications had occurred. The "start" time of each inspection, whether first-piece or intermediate, was recorded on a daily activity sheet[5] on which the

3. The Respondent "primarily makes sheet metal parts that form a storage system for the computer industry."

4. There were 15 or 20 machines in department 14, and 12 machines in department 15.

5. While the daily activity sheet provided for an entry of the start time, Lamoureux testified that he usually entered the finish time. The sheet provided no place to enter the finish time.

piece inspected was identified by number. In addition to the first-piece and intermediate inspection, Lamoureux from time to time also performed visual spot inspections of finished pieces stored in holding areas located in the vicinity of the departments. No entries for such spot inspections were required on the daily activity sheet. As part of Lamoureux's job, according to Forte" [t]here would be times that possibly a part might not conform to the blueprint and if Mr. Lamoureux would feel better by going into another area and checking to see that the part could function as is before making a disposition, he had this universal authority to do that [i]n the holding areas or the Assembly Department or even Product Development.[6]

On the morning of December 29, 1977, Paul Southard, the plant superintendent, around 9:55 a.m. came to Forte's office and told Forte that he had seen Lamoureux "taking a newspaper and going into the men's room." He asked Forte to "check it out and find out what was going on." Forte went to departments 12 and 14 and continually walked back and forth through these departments for about 35 minutes looking for Lamoureux.[7] About 10:35 a.m., Lamoureux, approaching from the direction of department 16, appeared in department 14, Forte said nothing to Lamoureux but returned to his office where he allegedly wrote, "Bernie not in Dept. 12 or 14 from 10:00 to 10:35—Then saw him at far end of Dept. near time clock." In the afternoon, about 1 o'clock, Forte was distributing a description of a dental plan to the inspection department and was unable to find Lamoureux in depart-

6. An inspector's assignments are always sufficient "to consume 100% of his time."

7. Forte did not check the men's room referred to by Southard nor did he use the paging system to try to locate Lamoureux.

ment 12 or 14. After about 25 minutes Forte found Lamoureux at a workbench inspecting a part. Forte said, "I've been looking for you. I've got to give you this dental plan." Nothing else was said. Forte returned to the office and allegedly noted, "12:50 to 1:05 not in Dept. 12 or 14, 1:10 to 1:20 not in Dept. 12 or 14. Then he was at coil bench w/pc at 1:20 p.m." Forte did not ask Lamoureux where he had been.

According to Forte, the next morning he checked Lamoureux's daily activity sheet and discovered that Lamoureux had noted that he had performed four inspections between 10 a.m. and 10:35 a.m. and three inspections between 12:55 p.m. and 1:15 p.m., the times when Forte had not seen him in either department 12 or 14. Forte reported his findings to his supervisor, McCallum. McCallum thought that "the offense was a dischargeable offense" and asked Forte to immediately accompany him to the office of Carl Dean, the vice president of manufacturing, and "explain the situation to him in regard to the violation." Forte reviewed his findings for Dean, after which Kendall Allen Hodder, the personnel director, was called to the meeting. Dean allegedly said "to check it out with Mr. Lamoureux to find out what the story was. And if what [Forte] found was substantiated through Mr. Lamoureux's description of what might have gone on, then we could discharge him." Thereafter Forte reduced the events involving Lamoureux to writing. A part of this memorandum recited:

> His record sheet shows he allegedly performed specific inspection operations [in] designated departments at times he himself recorded when he was not here as determined by personal and direct observation of his supervisor. This is a categorcial violation of group 1 rule #2—falsification of time reports.

Group 1, rule 2, provides that an employee may be discharged for the first infraction of "knowingly altering or falsifying production time reports, payroll records, or time cards, or punching another employee's time card without supervisory approval." [8]

An examination of the traveling inspection report and the credible record reveals that Lamoureux had performed all the inspections noted on his daily activity sheet during the times he was absent from departments 12 and 14. In this regard, Forte testified that "it was irrelevant as far as whether he did the work or didn't do the work as far as the decision to discharge." Forte testified also that he made no effort to determine whether inspections had actually been made,[9] although that fact could have been ascertained. Later in his testimony on redirect examination, Forte said he was instructed by McCallum to check the traveling sheets while the summary was being typed up and before Lamoureux was contacted. Forte said that he discovered from the traveling sheets that Lamoureux had signed the sheets. Prior to Forte's testimony, McCallum had testified, when called by the General Counsel, to the question:

> Q. But you never made a check on it to see if he actually did [the work] or not?
>
> A. That was not the issue here.

Later, after Forte had testified, McCallum as the Respondent's witness testified that:

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8. Personnel Director Hodder testified that the Respondent, under the rule, could exercise its discretion whether to discharge an employee or administer a lesser penalty.

9. Forte was asked:

> Q. Then I can assume, can I not, that you made no effort to determine if, in fact, these particular inspections were or were not made, correct?
>
> A. Correct.

> I went with him [Forte] for a brief moment of time to evaluate the traveling inspection documents which also go with the job. This evaluation did not indicate anything that would change our mind regarding the offense; here were some documents which had been signed by Mr. Lamoureux and others that had not and in some cases he would not have been required to sign them as there were intermediate inspections involved.[10]

At 3 p.m. Lamoureux was called to a meeting with Hodder, McCallum, and Forte. Lamoureux described what occurred:

> Well, they had me read the report and Mr. Forte said that he was out in the departments at that time, and he could not find me there and he showed me my sheets with the times on them. He asked me where I was and I told him I had gone to the men's room, but I had checked the jobs out.[11] So they said, "Well, you've got the times wrong." I believe it was Mr. Hodder and he said, "Didn't you read your rule book?" So I think it was around that time that I told him, "C'mon, you guys, you know I'm in here because of the Union."
>
> And, Mr. McCallum stated that he didn't believe Frank could trust me anymore,[12] and he didn't even

10. The change in the testimony of Forte and McCallum appears to have been an attempt to create the semblance of an investigation whereas there had been none.

11. McCallum testified that Lamoureux told them that he had "performed them earlier, and then just wrote these times in there to fill out this sheet."

12. McCallum testified that he told Lamoureux that "we could no longer trust him to perform his function, and the requirements of this job, and for falsification of these records." McCallum also observed that "Union activity in no way had anything to do with it."

> know if the jobs were checked out or not, and that they were going to discharge me; and they gave me my check.

During the conversation Lamoureux told them that the "times weren't accurate and they never were, but [he] told them, "If you want them right to the second, I can put them right to the second." Lamoureux also said that he had made visual checks during the time he was away from departments 12 and 14.[13]

McCallum asserted that Lamourex was discharged for falsification of time reports and for no other reason. McCallum explained, "Both Mr. Forte . . . and myself felt that we could no longer trust Mr. Lamoureux in performing his duties. He was indicating that he was on the job, specifying that he actually performed work when he was nowhere near the area; and therefore we could no longer trust him to carry out the duties of his function."

No other employee had been discharged under the same circumstances as Lamoureux.[14] However, employee Geradi, who violated a group 1 rule, was warned, not discharged; [15] employee Gleason, who also violated a group 1 rule, was likewise warned and not discharged.[16] In fact,

13. Forte testified that Lamoureux said he was "down probably in the back checking something."

14. The only other discharges for falsification of records involved one employee, a salesman who falsified his call reports, thus enabling him to collect money for calls he was not making, and another employee, an accountant, who was embezzling money.

15. His offense had been deliberate slowing down of production.

16. Other employees who were only warned were D. Geoffrey, who punched another employee's timecard, and Valerie Rousseau, chief inspector, who failed to punch her timecard and "admitted . . . that someone was punching her timecard. Did not notify her supervisor."

it would appear from an examination of the Respondent's handbook of information for employees that the Respondent was not a harsh employer but tried to understand and be helpful with its employees' problems. In referring to the personnel department, the handbook reveals that they are here to give you help and guidance. They are expected to insure that both sides of the problem are being brought out fairly . . . We believe it is healthy to talk about grievances." Moreover, Forte said that there would have been "nothing wrong" with Lamoureux being in the "bathroom for 15 to 20 minutes." Indeed, Forte agreed that Lamoureux could have been legitimately away from departments 14 and 15 during the time involved for a "multitude of reasons," including conferring with other inspectors in other parts of the plant which could have kept him away from the departments for 10 or 15 minutes, "getting a part from stock" which could have consumed "[M]aybe forty-five minutes," or going to the research and development department.[17] McCallum agreed that a dollar value could not be placed on Lamoureux's inaccurate reporting and considered money not to be the "issue." Moreover, McCallum admitted that Lamoureux had nothing to gain by the alleged falsification.

Lamoureux commenced working for the Respondent in November 1966, and had been an inspector for over 2 years.[18] His work was satisfactory; he received merit increases. When Forte rated Lamoureux in 1977, he was rated average or better than average in all categories (eight categories were marked average; seven better than

17. It would seem that the reason Forte failed to inquire of Lamoureux as to his whereabouts during his absence was due to the fact that he did not consider Lamoureux's absence to require explanation.

18. McCallum agreed with the General Counsel that the Respondent had a "real investment" in Lamoureux as an inspector.

average). In "potential for advancement," he was rated better than average. In this regard, Lamoureux was trained in the use of the optical comparator, a task which only one other inspector (Rousseau) was capable of performing. It involved the inspection of plastics, a difficult job. Lamoureux had instructed other inspectors and had instructed both McCallum and Forte on the optical comparator. Lamoureux had never been disciplined nor had any foreman found fault with his work. From time to time, Lamoureux made helpful suggestions to the Respondent, for which he was commended. Forte agreed that Lamoureux showed concern about doing a good job. A few weeks before Lamoureux was discharged, Forte had commended him for the good work he had performed on the night shift. Forte agreed from his observation of Lamoureux that he "knew what he was doing and could do the job." In fact, Forte said that Lamoureux "seemed to be very proud of the amount of work he was doing." Indeed, Forte commented, "I was very satisfied with the amount of work that it appeared that he was doing." Forte added, "Just looking at the sheets, I would assume that Mr. Lamoureux was performing in an admirable fashion." There is little question that the credible evidence establishes that Lamoureux did perform in an "admirable fashion," except for the inaccuracies which appeared on his daily activity sheet for December 29, 1977. The inattention which the Respondent allowed this detail is illustrated by an examination of several inspectors' daily activity reports. John Murdock's sheet for October 30, 1977, reveals that he entered a start time at 7:75 and the next at 8, another at 12:90 and the next at 1:10; and another at 1:75 and the next at 2. Other sheets reveal the same discrepancies. On V. Rousseau's sheet of October 28, 1977, she reported start times of 7:60, 7:70, 7:80, and 8. On another sheet, she reported 14:80 and 15:00

as successive start times. Her October 25, 1977, sheet shows starting times of 7:50, 7:60, 7:70, 7:80, and 8. The same was true on October 24. Other discrepancies appear in her sheets which lead to the conclusion that these were "plugged" entries. A cursory examination of these sheets would have revealed these inaccuracies.

Lamoureux testified that when the form first came out John Larson,[19] his supervisor at the time, told the employees that recording "the time was just to have a general idea of when the part was in a particular area of the shop." Lamoureux further said that Forte had not given oral or written instructions on the subject. Larson testified that he wanted something to the "closest five minutes." Larson also testified that the Brooks system, which was instituted after he put the daily activity sheets into effect, used the form to relate the total number of inspections to production. Larson explained:

> [I]f there were fifty operations run in the department and we covered forty, if we inspected forty of them, we'd have got an eighty percent coverage.

Precise time entries were not considered much of a factor as long as the inspection actually occurred. Both Larson and Forte, who followed Larson as supervisor, reviewed the daily activities sheets of all inspectors and entered on a weekly performance report the percent coverage for each department. The percent coverage was derived from comparing the number of new operations with the number of first-piece inspections. Nothing in this report was related to the time of each piece inspection. These reports were reviewed by McCallum.

According to McCallum the weekly performance reports covered "the percent of coverage in relationship to

19. Larson is no longer in the Respondent's employ.

first piece inspections to the total number of jobs that ran that particular area for the previous week" (80-percent coverage was the norm); "the average number of inspections performed by each individual inspector in a 1-hour period"; the number of inspections performed per hour per inspector (the average inspection took 10 to 15 minutes; [20] and "the actual hours worked both in a daily and weekly basis by inspectors versus planned work hours." Precise time entries for the inspection of each piece were not essential to preparing the weekly performance report.[21] Referring to the daily activity sheet, McCallum said, "We utilize these records for determining levels of staffing, and department and individual performance within a department." Since the sheet noted only start times, there was no way of ascertaining from the sheet (unless otherwise noted) what had been done between the times of the entries.[22] However, the procedure which requires the approval by an inspection before a piece may be produced and the inspector's notation on the traveling inspection report is a positive check as to whether the inspector has performed the inspection.

II. Conclusions and Reasons Therefor

It is well established that the General Counsel bears the burden of proving an unlawful discharge,[23] however,

20. Forte said the average inspection took about 12 minutes.

21. McCallum agreed with the General Counsel that the form could be filled out without reference to the entry of a starting time.

22. Forte testified that a completion time was not included because "the Inspector's job is to continually inspect. When you finish one job and start the next, that is an encompassing factor of the operation. It may be getting of tools and putting away of tools that have to go with the inspection of any given part."

23. See *N. L. R. B. v. Borden Co.*, 392 F. 2d 412, 416 (5th Cir. 1968); *G. H Hicks and Sons, Incorporated*, 141 NLRB 1272, 1273 (1963).

"once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." [24]

Here, the General Counsel has provided ample proof of the Respondent's antiunion motivation. In this regard, the General Counsel has offered credible proof that the discharge of Lamoureux, a union kingpin, would have gratified the Respondent's antiunion stance; [25] that the Respondent had knowledge of Lamoureux's union connections and knew that he was a union kingpin; [26] that usually the Respondent did not discharge an employee for the commission of a first offense of the kind here committed; and that the Respondent sustained no losses by reason of Lamoureux's misconduct. Moreover, the Respondent had a substantial investment in the cost of training Lamoureux as an inspector. Additionally, Lamoureux was a satisfactory employee, considered by the Respondent to have

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24. *N. L. R. B. v. Great Dane Trailers, Inc.*, 388 U. S. 26, 34 (1967).

25. "Of course, the company has a legal right to 'make no bones about its opposition to the Union.' *Hendrix Manufacturing Co. v. N. L. R. B.*, 321 F. 2d 100, 103 (5th Cir. 1963). However, the Board is entitled to consider emphatic anti-union attitudes as 'background' against which to measure the impact on employees of management's statements and conduct. 321 F. 2d at 103-04, fn. 6." *Independent Inc., d/b/a The Daily Advertiser v. N. L. R. B.*, 406 F. 2d 203, 205 (5th Cir. 1969).

26. "The discharge of employees who are actively engaged in union affairs gives rise to an inference of violative discrimination." *N. L. R. B. v. Montgomery Ward & Co., Incorporated*, 554 F. 2d 996, 1002 (C. A. 10, 1977).

been good material for advancement.[27] Without a doubt, the General Counsel has established a *prima facie* case.[28]

In response to the General Counsel's *prima facie* case, the Respondent claims as "legitimate objectives" the fact that Lamoureux must remain discharged because his recording of inaccuracies in start times for inspections exhibited an untrustworthiness which it cannot abide in its employees.[29] It added at the hearing that Lamoureux's alleged offense jeopardized the Brooks system of production control.[30] In weighing the Respondent's alleged jus-

27. "The rule is that if the employee has behaved badly it won't help him to adhere to the Union, and his employer's anti-union animus is not of controlling importance. But if the employee is a good worker and his breach of the work rules trivial, the more rational explanation for discharge may be invidious motivation. Such motivation can be found from the absence of any good cause for discharge. This must be so unless we are willing to assume something we know to be false: that businessmen hire and fire without any reason at all.

> "In the end after weighing all relevant factors including particularly the gravity of the offense, an unfair labor practice may be found only if there is a basis in the record for a finding that the employees would not have been discharged, though he may have been subjected to a milder form of punishment for the offense, except for the fact of his union activity." *Neptune Water Meter Company, a Division of Neptune International Corporation v. N. L. R. B.*, 551 F. 2d 568, 570 (4th Cir. 1977).

28. "Fundamentally, a *prima facie* case is one which is established by sufficient evidence and can be overcome only by a preponderance of competent, credible rebutting evidence." *National Automobile and Casualty Insurance Co.*, 199 NLRB 91, 92 (1972).

29. "There is clearly no obligation on the Board to accept at face value the reason advanced by the employer." *N. L. R. B. v. Buitoni Foods Corp.*, 298 F. 2d 169, 174 (3 Cir. 1962).

30. This alleged justification has no validity at all. The credible evidence discloses that the start time entries are not essential

tification for its conduct, it must be considered that "an employer may hire and discharge at will, so long as his action is not based on opposition to union activities." *N. L. R. B. v. The Little Rock Downtowner, Inc.*, 341 F. 2d 1020, 1021 (8th Cir. 1965), citing *N. L. R. B. v. South Rambler Company*, 324 F. 2d 447, 449 (8th Cir. 1963). "[A]bsent a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all." *N. L. R. B. v. O. A. Fuller Super Markets, Inc.*, 374 F. 2d 197, 200 (5th Cir. 1967). However, "[t]he mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not be a desire to discourage union activity." *N. L. R. B. v. Symons Manufacturing Co.*, 328 F. 2d 835, 837 (7th Cir. 1964). "A justifiable ground for dismissal is no defense if it is a pretext and not the moving cause." *N. L. R. B. v. Solo Cup Company*, 237 F. 2d 521, 525 (8th Cir. 1956). "[T]he 'real motive' of the employer in an alleged 8(a)(3) violation is decisive. . . ." *N. L. R. B. v. Brown Food Store*, 380 U. S. 278, 287 (1965). I am convinced that the "real motive" for the Respondent's discharge of Lamoureux was to discourage membership in a labor organization. As for trustworthiness, Lamoureux's work pattern had been the same for over 2 years, concerning which the Respondent had registered no complaints. His work had been satisfactory. The amount of work he produced indicated that he had not and was not cheating

30. (Cont'd.)
nor are they noticed in the compilation of the weekly performance report which is the only document from the inspection department which is utilized within the Brooks system. The Brooks system functions without reference to the start time entries. The Respondent's reliance on this unsubstantiated justification is totally unconvincing and "bear[s] the hallmarks of afterthought." *N. L. R. B. v. S. E. Nichols-Dover, Inc.*, 414 F. 2d 561, 564 (3d Cir. 1969).

the Respondent. His production satisfied the norm set by the Brooks system. Moreover, if the untrustworthiness charge (which sprang from the inaccuracies in the start time recording) is valid, then other inspectors would also have been guilty of untrustworthiness since their daily activity reports disclosed on their faces (and easily discernible) inaccuracies in the recording of start time.[31] Indeed, the credible evidence does not reveal that the Respondent had insisted on a wholly accurate recording of the start times. Furthermore, other employees who were guilty of group 1 rule offenses were warned rather than discharged for the first offense.[32] Moreover, considering the high standard of trustworthiness which the Respondent was exacting from Lamoureux, it is incongruous that it required so little from Chief Inspector Rousseau that she received only a warning for having another employee punch her timecard. Her "phonied up" timecard should arouse a strong suspicion of dishonesty since she could have used the phony card to cover up an absence, tardiness, or early quitting time, any of which would have cost the Employer money. Moreover, if Rousseau had "phonied up" her timecards, it seems likely that she might have "phonied up" her start times on her daily activity sheets. For this offense Rousseau could have been discharged (see Group 1, rule 2, cited above,) but she was not. Disparate treatment is obvious; discrimination proved.[33]

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31. The little apparent attention which the Respondent gave this detail obviously invited abuse.

32. "[V]ariance from the employer's 'normal employment routine' further supports illegal motive. *McGraw-Edison Company v. N. L. R. B.*, 419 F. 2d 67, 75 (8th Cir. 1969).

33. This discrimination assumes a more pronounced aspect when one considers the reprehensible character of phony timecards which the Board describes in *Rock Tenn Company, Corrugated Division*, 234 NLRB 823 (1978), "[F]alsification of the timecard amounts to dishonesty and theft."

Thus, the record reveals that Lamoureux's first offense of seemingly inoffensive significance[34] (at least when measured by the Respondent's past practice) was blown up to a point where it accommodated the Respondent's antiunion stance.

The credible evidence further supports a finding that Forte showed little concern for Lamoureux's absence from his job on the two occasions even though Plant Superintendent Southard asked him to check Lamoureux out. His concern deepened only after his conference with McCallum, and the whole incident ripened into a discharge after Dean and Hodder became involved. Indeed, the decision to discharge and the preparation of Lamoureux's final check were wholly completed before the Respondent allowed Lamoureux to counter the charge of untrustworthiness. His charge was already a *fait accompli*. His good points, the fact that he had actually made the inspections and was not cheating the Respondent, and his explanation for the inaccurate recordings were ignored in reaching the decision to discharge him. The Respondent's attitude was—"Ah ha, we caught him committing an infraction, he must be summarily fired without recourse. "This attitude seems strange and unexplainable for an employer who boasts an enlightened approach to employee problems and grievances in its handbook. It is obvious that the seriousness of the offense was magnified to fit the Respondent's predetermined penalty. When "the reasons advanced [for a discharge] are not persuasive, the [protected activity] may well disclose the real motive behind the employer's action." *N. L. R. B. v. Melrose Processing Co.*, 351 F. 2d 693, 699 (8th Cir. 1965).

I am convinced that the Respondent's "real reason" for discharging Lamoureux was concealed and the reason

34. When measured in terms of need for the information to be derived from exact start times, the offense becomes trivial.

asserted by the Respondent was false. I draw this conclusion from the record as a whole and from the demeanor of the witnesses produced by the Respondent. I do not believe that they were truthful in revealing the "real reason" for Lamoureux's discharge. The Board has recently said in *Best Products Company, Inc.*, 236 NLRB 1024 (1977):

> In *Shattuck Denn Mining Corporation v. N. L. R. B.*, 362 F. 2d 466, 470 (9th Cir. 1966), the court stated that where the trier of fact finds that an asserted motive for discharge is false he can infer that there is another motive. "More than that, he can infer that the motive is one that the employer desires to conceal —an unlawful motive—at least where the surrounding facts tend to reinforce that inference."

In any event I conclude that the discharge of Lamoureux was not based on the reasons declared by the Respondent, but resulted from the Respondent's desire to discourage union activity and gratify its antiunion purposes.[35] " 'It is well settled that the mere existence of a valid ground for discharge is no defense to an unfair labor charge if such ground was a pretext and not the moving cause.' It must be shown, however, that the improper motive—union activity—is the dominant reason for the discharge." *N. L. R. B. v. Pioneer Plastics Corporation*, 379 F. 2d 301, 307 (1st Cir. 1967). "[A] business reason cannot be used as a pretext for a discriminatory firing." *N. L. R. B. v. Ayer Lar Sanitarium*, 436 F. 2d 45, 50 (9th Cir. 1970). The Respondent clearly used its reasons as pretexts. It is also clear that the "dominant reason for

35. In this regard, the Respondent had vigorously opposed the Union during the 1976 and 1977 election campaigns, and no doubt by the discharge of Lamoureux was preparing for the 1978 campaign.

discharge" was Lamoureux's union activities. Cf. *Berbiglia, Inc.*, 237 NLRB 102 (1978).

In consideration of this finding, I have reviewed the decisions of the First Circuit upon which the Respondent so heavily relies. The Respondent asserts that the General Counsel has not met the burden of proof in such decisions, specifically citing *N. L. R. B. v. Rich's of Plymouth, Inc.*, 578 F. 2d 880, 886 (1st Cir. 1978), as follows:

> Respondent having offered a legitimate business justification for his conduct, the burden shifted to the Board to establish by substantial evidence "an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one," *N. L. R. B. v. Billen Shoe Co.*, 397 F. 2d 801, 803 (1st Cir. 1968). In our *repeated efforts to impress this standard* upon the Board, we have variously redefined it to mean that the decision would not have been made "but for" the employee's union activity, *Coletti's Furniture, Inc. v. N. L. R. B.*, 550 F. 2d 1292, 1293 (1st Cir. 1977), that union animus was the "dominant" reason, *N. L. R. B. v Lowell Sun Publishing Co.*, 320 F. 2d 835, 842 (1st Cir. 1963), or the "controlling" motive, *N. L. R. B. v. Fibers International Corporation*, 439 F. 2d 1311, 1315 (1st Cir. 1971). By whatever phraseology, we have attemptted to make it clear that "the mere existence of antiunion animus in not enough" to make out an 8(a)(3) violation, *N. L. R. B. v. Billen Shoe, supra*, 397 F. 2d at 803. [Emphasis supplied.]

In addition, I have examined the First Circuit decision cited in the *Rich's of Plymouth* case, *Hubbard Regional Hospital v. N. L. R. B.*, 579 F. 2d 1251 (1978), cited by the Respondent, and *P. S. C. Resources, Inc. v. N. L. R. B.*,

576 F. 2d 380 (1978).[36] While I am not convinced that the Respondent has offered a legitimate business justification for its conduct (since Lamoureux's omission could have been easily corrected by counseling without any serious consequence to the Respondent),[37] nevertheless, assuming *arguendo* that a legitimate business justification was forthcoming, I am convinced that the General Counsel has met the First Circuit's burden. The Respondent chose the "bad" cause because it wanted to rid itself of a union partisan and commence to gird itself against the probable next union election campaign. I do not think this was Forte's idea. It originated with Forte's supervisors. I consider Forte to be an honest, forthright individual who

36. In this case, the court used the language: "However, the evidence that the reasons petitioner has offered for the discharge are 'inconsistent with its previous practice, against its apparent interest and inconsistent with its subsequent actions' . . . sufficiently compensates for the other weak links in respondent's case." 576 F. 2d at 384. In the instant case, it obviously was not in the Respondent's best interests to discharge a well-trained, competent employee (who was considered a "real investment"). Moreover, for offenses involving untrustworthiness of as serious a nature, the Respondent had not discharged employees. Indeed, there was no showing by credible evidence that it had been the Respondent's general practice to discharge an employee where the consequences of his offense caused little serious detriment to the Respondent, as here, for the first offense.

37. "Such action on the part of an employer is not natural. If the employer had really been disturbed by the circumstances it assigned as reasons for these discharges, and had had no other circumstances in mind, some work of admonition, some caution that the offending lapse be not repeated, or some opportunity for correction of the objectionable practices, would be almost inevitable. The summariness of the discharges of these employees, admittedly theretofore satisfactory, gives rise to a doubt as to the good faith of the assigned reasons." E. Anthony & Sons, Inc., 163 F. 2d 22, 26-27 (D. C. Cir. 1947).

was not generally given to lying. As I watched him testifying, this impression prevailed until he was subjected to questions concerning Lamoureux's discharge. Here, being generally a truthful man, he showed physical signs of dissembling. One would have had to have been a novice in this business not to have known he was covering up for his superiors. The Lamoureux incident became a "Federal case" upon its having reached a level of supervision beyond Forte where it was decided that Lamoureux should be discharged forthwith. Indeed, his final check was drawn before he was allowed to state his position.[38]

The Respondent's reasons for Lamoureux's discharge were both false and pretextual. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Bernard R. Lamoureux on December 30, 1977.[39]

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it

38. As the court observed in *United States Rubber Company v. N. L. R. B.*, 384 F. 2d 660, 662-663 (5th Cir. 1967), "Perhaps most damning is the fact that [the employee] was summarily discharged after reports of . . . misconduct . . . without being given any opportunity to explain [his conduct] or give [his] version of the incidents." Here Lamoureux's hearing was to give an air of legitimacy to unlawful action already taken.

39. I have considered the decision of the Massachusetts Division of Employment Security in which it was found that "the claimant did not falsify his daily quality control sheet as alleged by the employer," pursuant to the Board's decision on the subject. *Duquesne Electric and Manufacturing Company*, 212 NLRB 142 (1974). However, had I not considered it, my decision would have been the same.

will effectuate the policies of the Act for jurisdiction to be exercised herein.

3. By unlawfully discharging Bernard R. Lamoureux on December 30, 1977, and refusing thereafter to reinstate him, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. It having been found that the Respondent unlawfully discharged Bernard R. Lamoureux on December 30, 1977, in violation of Section 8(a)(3) and (1) of the Act, it is recommended in accordance with Board policy that the Respondent be ordered to offer the foregoing employee immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing if necessary any employee hired on or since December 30, 1977, to fill said position, and make him whole for any loss of earnings that he may have suffered by reason of the Respondent's act herein detailed, by payment to him of a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in

F. W. Woolworth Company, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[40]

Additionally, because the Respondent's unfair labor practices go to the very heart of the Act, a broad order requiring the Respondent to cease and desist from in any other manner infringing upon rights guaranteed to its employees by Section 7 of the Act is recommended. *N. L. R. B. v. Entwistle Manufacturing Co.*, 120 F. 2d 532 (4th Cir. 1941).

Upon the basis of the foregoing finding of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[41]

The Respondent, Wright Line, a Division of Wright Line, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by unlawfully discharging any of its employees or discriminating against them in any other manner with respect to their hire or

40. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

41. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

tenure of employment in violation of Section 8(a)(3) of the Act.

(b) In any other manner interfering with, restraining, or coercing any employees in the exercise of the rights guaranted them by Section 7 of the National Labor Relations Act, as amended, to engage in self-organization, to bargain collectively through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection, or to refrain from any and all these things.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Bernard R. Lamoureux immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, discharging if necessary any employee hired to replace him and make him whole for any loss of pay that he may have suffered by reason of the Respondent's unlawful discharge of him in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make a available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post its facility at Worcester, Massachusetts, copies of the attached notice marked "Appendix."[42]

42. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board"

Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's representative, shall be posted by it, immediately upon receipt thereof, for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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42. (Cont'd.)

shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1721.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WRIGHT LINE, A DIVISION OF
WRIGHT LINE, INC.,
Respondent.

Before CAMPBELL, BOWNES and BREYER, Circuit Judges.

ORDER OF COURT

Entered: October 16, 1981

It is ordered that the petition for rehearing filed on October 13, 1981 be, and the same hereby is, denied.

By THE COURT:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Schwachter, Kirle and DuRoss]

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WRIGHT LINE, INC.,
Respondent.

ORDER OF COURT

Entered October 22, 1981

Upon motion of Respondent to stay mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by November 23, 1981, and notice of such filing to be filed promptly with the Clerk of this Court,

It is ordered that said mandate be, and the same hereby is, stayed.

By THE COURT:
/s/ DANA H. GALLUP
Clerk.

[Cert. cc: N. L. R. B., cc: Messrs. Moore, Schwachter, Kirle, DuRoss, and Beal.]

Opposition

FILED
FEB 8 1982
ALEXANDER L. STEVAS,

No. 81-987

In the Supreme Court of the United States

OCTOBER TERM, 1981

WRIGHT LINE, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board, upheld by the court of appeals, properly found that the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging one of its employees, Bernard Lamoureux, because of his union activities.

2. Whether the Board and the court of appeals properly considered the Company's anti-union statements which contained "no threat of reprisal or force or promise of benefit" as relevant background in analyzing the circumstances of the Company's decision to discharge Lamoureux.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Associated Press v. *NLRB*, 301 U.S. 103	10
Florida Steel Corp. v. *NLRB*, 587 F.2d 735	13
Hendrix Manufacturing Co. v. *NLRB*, 321 F.2d 100	12
Herman Bros., Inc. v. *NLRB*, 658 F.2d 201	11
International Union, UAW v. *NLRB*, 363 F.2d 702, cert. denied, 385 U.S. 973	12
Local 357, International Brotherhood of Teamsters v. *NLRB*, 365 U.S. 667	10
Mt. Healthy City Board of Education v. *Doyle*, 429 U.S. 274	5
NLRB v. *Brown*, 380 U.S. 278	10
NLRB v. *Burns Motor Freight, Inc.*, 635 F.2d 312	11
NLRB v. *Charles Batchelder Co.*, 646 F.2d 33	11
NLRB v. *Colvert Dairy Products Co.*, 317 F.2d 44	12
NLRB v. *Fixtures Manufacturing Corp.*, No. 81-1398 (8th Cir. Jan. 14, 1982)	11
NLRB v. *General Electric Co.*, 418 F.2d 736	12
NLRB v. *Kropp Forge Co.*, 178 F.2d 822, cert. denied, 340 U.S. 810	12
NLRB v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442	11
NLRB v. *Nevis Industries, Inc.*, 647 F.2d 905	11
NLRB v. *Robin American Corp.*, 654 F.2d 1022	11

Cases—Continued Page

NLRB v. *Rockwell Manufacturing Co.*, 271 F.2d 109 12
Peavy Co. v. *NLRB*, 648 F.2d 460 11

Statute and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. 158(a)(1) 5
Section 8(a)(3), 29 U.S.C. 158(a)(3) 5, 10
Section 8(c), 29 U.S.C. 158(c) 12
Section 10(c), 29 U.S.C. 160(c) 7, 10

29 C.F.R. 101.10(b) 7

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 662 F.2d 899. The decision and order of the National Labor Relations Board (Pet. App. A25-A79) are reported at 251 N.L.R.B. 1083.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1981. The petition for a writ of certiorari was filed on November 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner ("the Company") manufactures computer storage products to the specifications of its customers (Pet. App. A54). Bernard Lamoureux began working for the Company in 1966, and, with the exception of a period between 1971 and 1973, worked there continuously until his discharge on December 30, 1977 (*id.* at A53, A63).

During the last two years of his employment, Lamoureux worked in the Company's Inspection Department, inspecting completed parts for quality and conformity to specifications (Pet. App. A63). This position required that he keep records on two forms: the Inspection Report, which stayed with the blueprint of the inspected part, and the Daily Activity Sheet, on which he placed the number of the inspected part, the type of inspection, and the time he had begun each inspection. He submitted his Daily Activity Sheet to his supervisor after each day's work (*id.* at A57-A58). The Company considered Lamoureux's work to be satisfactory or better (*id.* at A63-A64).

While working as an inspector in 1976, Lamoureux contacted Teamsters Local 170 ("the Union") and initiated an organizational effort among the Company's employees (Pet. App. A56). A representation election was held at the plant on August 27, 1976; the Union lost (*id.* at A55). A year later, in the fall of 1977, the organizational effort resurged at the plant, and again Lamoureux actively solicited employee support for the Union (*id.* at 55-56).[1] During

[1] During both this and the earlier organizational effort, the Company actively opposed the Union and urged the employees to vote against it in the election. During the 1977 campaign, the Company distributed antiunion leaflets to the employees

the 1977 campaign, Francis Forte, Lamoureux's supervisor, called Lamoureux into his office and charged him with " 'pressuring someone to vote union in the paint department' " (*id.* at A56). Lamoureux denied this accusation and Forte subsequently apologized, saying that his use of the word " 'pressure was too strong' " (*ibid.*). On another occasion during the 1977 campaign, while Lamoureux was counting his paycheck money, Forte remarked, "What's that? Union campaign funds?" Shortly before the election, one of the Company's foremen told Lamoureux that " '[e]verybody knows you're the Union kingpin' " (*ibid.*). A representation election was held on October 20, 1977. The Union lost the election (*id.* at A55).

On the morning of December 29, 1977, the Company's plant superintendent asked supervisor Forte to "check" on Lamoureux, explaining that he had just seen Lamoureux " 'taking a newspaper and going into the men's room' " (Pet. App. A58). Forte then went to Lamoureux's two assigned departments and walked back and forth between them until he observed Lamoureux about 35 minutes later (*id.* at A58-A59). During the interim, Forte made no attempt to see whether Lamoureux was still in the men's room (*id.* at A58). Nor did he try to locate Lamoureux by using the plant's page system, although Lamoureux's job included several tasks that required him to be away from his departments for short spans of time.

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containing newspaper articles which were derogatory to the Union. Also as part of its 1977 antiunion effort, the Company president wrote several letters to the employees shortly before the election urging them to "Vote *No*" in the upcoming representation election. In one such letter, the Company president told the employees that the Company's " 'chances for survival and growth would be seriously hurt by the presence of a union' " (Pet. App. A55-A56).

When Forte saw Lamoureux, he said nothing to him. Instead, Forte returned to his office and recorded the times of Lamoureux's absence (*ibid.*).

Later that day, Forte had occasion to visit Lamoureux's departments and did not find Lamoureux in either location. About 30 minutes later, Forte discovered Lamoureux at a workbench inspecting a part. Forte again said nothing to Lamoureux, but returned to his office and, as he had done earlier that day, recorded the time that Lamoureux had been away from his departments (Pet. App. A58-A59).

The next morning, December 30, Forte checked Lamoureux's Daily Activity Sheet from the previous day and noted that Lamoureux had indicated that he had made several inspections during the periods in which Forte had recorded that Lamoureux was absent from his departments (Pet. App. A59). Forte presented these findings to his superior, Donald McCallum, who told Forte that this was a " 'dischargeable offense' " (*ibid.*). Forte and McCallum then reported Forte's observations to the Company's vice president of manufacturing and its personnel director. The vice president responded that Lamoureux could be discharged if his account substantiated Forte's charge (*ibid.*). In a written report of the incident, Forte stated that Lamoureux had violated a company rule concerning the falsification of time reports; Forte also arranged to have Lamoureux's final paycheck prepared (*id.* at A59-A60, A62).[2]

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[2] The rule that Lamoureux was accused of violating provided that an employee may be discharged for "knowingly altering or falsifying production time reports, payroll records, or time cards, or punching another employee's time card without supervisory approval." It was one of thirteen infractions listed under "Group I" of the Company's work rules. For

That afternoon, Forte summoned Lamoureux to a meeting attended by Forte, McCallum and the personnel director (Pet. App. A61). When Forte read his findings concerning the time discrepancies, Lamoureux stated that the times on the sheet " 'weren't accurate and they never were,' " and added that " '[i]f you want them right to the second, I can put them right to the second' " (*id.* at A62). Lamoureux added that the real reason he was in there was because of his union activities (*id.* at A61). McCallum told Lamoureux he was discharged, handed him his paycheck, and ended the meeting (*id.* at A61-A62).

2. The Board found that the Company had discharged Lamoureux because of his union activities, in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1) (Pet. App. A50). In reaching its decision, the Board adopted and applied the causation test set forth in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977).[3] Under that test, the General Counsel is required to "make a

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Group I infractions, management had the discretion either to discharge the offending employee or to administer a lesser penalty (Pet. App. A59-A60).

[3] In that case, Doyle, an untenured teacher, brought suit against the School Board, alleging that his rights under the First and Fourteenth Amendments had been violated by the School Board's refusal to renew his contract. The district court found that Doyle was entitled to reinstatement and backpay because protected activity had played a substantial part in the School Board's decision not to rehire Doyle. This Court reversed on the ground that a "rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing" (429 U.S. at 285). Accordingly, the Court fashioned the following test to be applied on remand (*id.* at 287):

prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," after which the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct" (Pet. App. A44).

Applying this test, the Board found that the General Counsel had "made a *prima facie* showing that Lamoureux's union activity was a motivating factor in [the Company's] decision to discharge him" (Pet. App. A49). The Board relied, in part, on "[the Company's] union animus, as reflected in the hostility directed toward Lamoureux resulting from his active role in the union campaign as well as the timing of the discharge, which occurred shortly after completion of the latest union [campaign]" (*ibid.*). The Board further found "of significance [the Company's] sudden and unexplained departure from its usual practice of declining to discharge employees for their first violation of this nature" (*ibid.*). Finally, the Board noted that the Company's "action * * * is especially suspect in light of Lamoureux's admirable work record and the fact that his timesheet * * * neither inured to his benefit nor served to affect detrimentally [the Company's] production control system" (*ibid.*).

Initially, in this case, the burden was properly placed upon respondent [Doyle] to show that his conduct was constitutionally protected, and that his conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

The Board next found that the Company had "failed to demonstrate that it would have taken the same action against Lamoureux in the absence of his engaging in union activities" (Pet. App. A49). Thus, the Board noted that Lamoureux's "record discrepancies were only discovered by [supervisor] Forte following the plant supervisor's directive to 'check' on Lamoureux [and that this directive was given] despite the fact that [the Company] had no reason to believe that Lamoureux was untrustworthy" (*ibid.*). The Board also observed that "such record discrepancies were commonplace and generally resulted in no discipline whatsoever," and that the Company's action evinced disparate treatment, since "[i]n those instances where discipline was imposed, [the Company] issued warnings or other forms of discipline short of discharge" (*id.* at A50).

The Board ordered, *inter alia*, that Lamoureux be reinstated with back pay (Pet. App. A50, A78).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A21). The court concluded (Pet. App. A12) that the Board may properly provide that " '[O]nce [a prima facie showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.' " However, the court added, the "burden" referred to "is a burden of going forward to meet a prima facie case, not a burden of persuasion on the ultimate issue of the existence of a violation" (*ibid.*; footnote omitted).[4] The court found that the Company had failed to sustain that burden here.

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[4] The court explained (Pet. App. A9-A10; footnote omitted) that, since Section 10(c) of the Act, 29 U.S.C. 160(c), and the Board's Rules, 29 C.F.R. 101.10(b), make clear that "the general counsel must prove the employer's guilt by a pre-

Thus, the court concluded that the circumstances surrounding the discharge of Lamoureux, taken together and in the light of the background of the Company's opposition to the Union and to Lamoureux's activity on its behalf,[5] "support the Board's inference

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ponderance of the evidence to warrant a finding that an unfair labor practice has occurred," the "only burden which may be acceptably placed on the employer is a 'burden of production,' that is a burden of coming forward with credible evidence to rebut or meet the general counsel's prima facie case." Accordingly, the court disagreed with the Board insofar as it held, in adopting "*Mt. Healthy's* allocation of the burdens of proof" (Pet. App. A8), that the burden that is shifted to the employer, once the General Counsel has established a prima facie case, is "a burden of persuasion on the ultimate issue of the existence of a violation" (*id.* at A12; footnote omitted).

The court also found "a critical difference between [*Mt. Healthy*] and most labor cases" (Pet. App. A13; emphasis in original):

> In *Mt. Healthy*, the employer conceded that he had fired the employee for speech activity which was later found to be fully protected by the first amendment. Thus, the "but for" test was not used, as it is in the typical labor case, as a part of the process of deciding whether a violation of protected rights had occurred. Rather, the "but for" test applied only *after* such a violation had been proven by the employer's own admission. * * *

[5] The court rejected the Company's claim that in determining the motive for the discharge, the Board improperly considered the Company's prior anti-union statements because those statements were not themselves found to have been unlawful. The court stated (Pet. App. A16 n. 14):

> anti-union statements "plainly within [management's] rights . . . do lend a significance to otherwise ambiguous events when the question is whether a given course of conduct was actuated by anti-union animus." *NLRB* v. *Lowell Sun*, 320 F.2d [835 (1st Cir. 1963)] at 840. The incidents cited, whether lawful of [*sic*] not, do not prove

that the [C]ompany was watching Lamoureux for any transgression that might provide an opportunity for discharge, and that it seized on Lamoureux's otherwise trivial offense to effectuate its true purpose of getting rid of an activist" (Pet. App. A17). The court acknowledged that this "inference might have been overcome had there been evidence establishing that [the Company] would have fired employees in Lamoureux's position (whether or not union activists) for this sort of infraction" (*id.* at A18). But, "Lamoureux testified, and the Board was entitled to believe, that he had never been instructed to record times exactly, that he had never heard of any employee being criticized for inaccurate reporting of times, and that the general practice among inspectors was to record times in 'round figures' " (*id.* at A19). "Further, the evidence showed that [the Company's] past practice in handling similar offenses had been quite different" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 15) that the Board and the court of appeals erred in applying the *Mt. Healthy* "but for" test, rather than a "dominant motive" standard, in discriminatory discharge cases under the National Labor Relations Act. There is no merit to this contention.

This Court has repeatedly held that "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" of whether that action runs afoul of the Act's prohibitions against discrimination.

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that Lamoureux was discharged because of his union activity. But they do show that the [C]ompany knew of his activity and was displeased by it, they thus provide a relevant background for analyzing the circumstances of the discharge.

Local 357, International Brotherhood of Teamsters v. *NLRB*, 365 U.S. 667, 675 (1961). See also *NLRB* v. *Brown*, 380 U.S. 278 (1965); *Associated Press* v. *NLRB*, 301 U.S. 103 (1937). A test of causation that requires a showing that the employee would not have been discharged "but for" his or her union activity accommodates the legitimate competing interests inherent in dual motivation cases, while at the same time serving to effectuate the policies and objectives of Section 8(a)(3) of the Act. As the Board explained (Pet. App. A43-A44), "the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. * * * [S]hould the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because it[s] action will be found to have been motivated by an unlawful consideration * * *."[6] There is nothing in the language of the Act or its legislative history that requires the Board to go further and establish that union activity was the "dominant motive" for the discharge.

As petitioner notes (Pet. 12-15), the courts of appeals have disagreed in the past as to the proper test to be applied in determining motivation in discrimi-

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[6] Nor is a different conclusion required by Section 10(c) of the Act, 29 U.S.C. 160(c), which provides that the Board shall not order the reinstatement of, or the payment of backpay to, any employee who "was suspended or discharged for cause." As the Board pointed out (Pet. App. A41), the legislative history of that provision indicates that the employer, not the General Counsel, has the burden of showing that the employee was discharged for cause.

natory discharge cases under the Act. Until recently, the First Circuit was the leading proponent of the "dominant motive" standard. However, it now appears that the disagreement among the circuits has been resolved. Thus, since the Board in the present case reformulated its causation test to conform to the "but for" analysis set forth in *Mt. Healthy*, every court of appeals that has had an opportunity to examine the Board's new test has approved it. See *NLRB* v. *Robin American Corp.*, 654 F.2d 1022, 1025 (5th Cir. 1981); *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 446 (6th Cir. 1981); *Peavy Co.* v. *NLRB*, 648 F.2d 460, 461 (7th Cir. 1981); *NLRB* v. *Nevis Industries, Inc.*, 647 F.2d 905, 909 (9th Cir. 1981); *NLRB* v. *Fixtures Manufacturing Corp.*, No. 81-1398 (8th Cir. Jan. 14, 1982).[7] Similarly, petitioner acknowledges (Pet. 15) that the "First Circuit has fully retreated from the dominant motive standard to a 'but for' requirement." Although the First Circuit in this case disagreed "with the Board on the narrow issue of defining the exact nature of the burden which the employer thus acquires" (Pet. App. A9)—holding that it is "one of 'production' rather than 'persuasion'" (*id.* at A11)—there is no need to resolve that question here,[8] since

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[7] See also *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 38-39 (2d Cir. 1981); *Herman Bros., Inc.* v. *NLRB*, 658 F.2d 201, 208-209 (3d Cir. 1981), and *NLRB* v. *Burns Motor Freight, Inc.*, 635 F.2d 312, 315 (4th Cir. 1980), where the courts noted the Board's new test, but found it unnecessary to apply that test in the particular circumstances presented.

[8] In *NLRB* v. *Fixtures Manufacturing Corp.*, *supra*, the Eighth Circuit concluded that the "First Circuit's criticisms of the *Wright Line* analytical framework * * * are not well taken," and that shifting the burden of persuasion to the employer "is well within the latitude that the Board should have in structuring its fact-finding process in difficult cases" (slip op. 7 n. 4).

the court found that petitioner had not even sustained the lesser burden of "producing evidence to balance, not to outweigh, the evidence produced by the general counsel" (Pet. App. A12).

2. Likewise without merit is petitioner's claim (Pet. 8-11) that, in determining the motive for Lamoureux's discharge, the Board and the court below improperly considered the Company's statements made in opposition to the Union and the union-related remarks it directed to Lamoureux, because those statements contained "no threat of reprisal or force or promise of benefit" and are thus protected under Section 8(c) of the Act, 29 U.S.C. 158(c). The Board and the court of appeals merely applied the long settled rule that protected statements may properly be considered "to draw the background of the controversy and place other nonverbal acts in proper perspective." *International Union, UAW* v. *NLRB*, 363 F.2d 702, 707 (D.C. Cir.), cert. denied, 385 U.S. 973 (1966); *NLRB* v. *General Electric Co.*, 418 F.2d 736, 761 (2d Cir. 1969); *Hendrix Manufacturing Co.* v. *NLRB*, 321 F.2d 100, 103 (5th Cir. 1963); *NLRB* v. *Kropp Forge Co.*, 178 F.2d 822, 827-828 (7th Cir. 1949), cert. denied, 340 U.S. 810 (1950).

The cases relied on by the Company (Pet. 10-11) are not to the contrary. In *NLRB* v. *Colvert Dairy Products Co.*, 317 F.2d 44 (10th Cir. 1963), the court held that an employer's protected statements during a union drive could not be used as a basis for making credibility determinations against it. But the court expressly noted that it was "not inferring that evidence of [anti-union] attitude is not material to or admissible in the determination of intent or the judging of credibility in labor cases. It often is." *Id.* at 46. Similarly, in *NLRB* v. *Rockwell Manufacturing Co.*, 271 F.2d 109, 117-119 (3d Cir. 1959), the court held

that protected statements could not be used to find otherwise proper inquiries and statements coercive. Finally, in *Florida Steel Corp.* v. *NLRB*, 587 F.2d 735, 742 (5th Cir. 1979), the court held that the employer's lawful opposition to unions could not be used as background for an allegedly unlawful discharge unless the evidence shows a "causal connection between the anti-union attitude of the employer and the discharge." Here, as the court of appeals pointed out (Pet. App. A16; footnote omitted), "[t]he evidence showed [not only] that management was aggressive in its opposition to the union [but also that the] management's hostility was on occasion directed at Lamoureux in particular."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 360282 703

Amicus Brief

Office - Supreme Court, U.S.
FILED
JAN 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-987

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BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITION FOR CERTIORARI

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Pandick Press Midwest, Inc., Chicago • 454-7600

TABLE OF CONTENTS

Page

Interest of the Amicus 1

Summary of the Argument 5

Reasons for Granting the Writ 13

I. The Circuit Courts Are Divided on Whether The Board's General Counsel Can Establish A Violation Of Section 8(a)(3) Without Proving That Union Animus Was The Employer's Dominant Motive. 13

A. Congress intended that the Board inquire into the Employer's real motive for discharge 15

B. The Board's "In Part" Analysis Has Been Rejected by Many Circuit Courts 25

C. The Board's "Wright Line" Test Perpetuates Its Discredited "In Part" Analysis 32

Page

D. The Board's Attempt To Shift The Burden of Proof To The Employer Violates The Act and The Administrative Procedure Act and Misapplies This Court's Mt. Healthy and Great Dane Decisions 37

E. The Circuit Courts Remain Divided Concerning The Proper Test to be Applied In Dual Motive Cases 46

II. The Circuit Court's Use of The Employer's Campaign Position To Buttress the Finding Of An Unfair Labor Practice Penalizes Protected Speech and Conflicts With Decisions of Other Courts of Appeals 53

A. Allowing the General Counsel To Use Protected Speech To "Prove" Discriminatory Motive Improperly Lightens His Statutory Burden of Proof 61

Page

III. The Conflicts Over Motivation Test, Burden of Proof and Protected Employer Expression and the Likelihood of The Board's Continued Use of Its Own Test Warrant Resolution by This Court . . . 64

CONCLUSION 73

TABLE OF AUTHORITIES CITED

CASES

	Page
Associated Press v. NLRB, 301 U.S. 103 (1937)	17
Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978)	39
Campbell & McLean, Inc., 118 N.L.R.B. 967 (1957)	38
Charge Card Ass'n v. NLRB, 653 F.2d 272 (6th Cir. 1981)	50
Chicago Magnesium Castings Co. v. NLRB, 612 F.2d 1028 (7th Cir. 1980)	27
Colletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st. Cir. 1977)	27
Columbia Prods. Corp., 48 N.L.R.B. 1452 (1953)	21
Coppus Eng'r Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957) . .	58

Page

Dow Chemical Co., Texas Div. v. NLRB, 660 F.2d 637 (5th Cir. 1981) 57

Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363 (3d Cir. 1978) 30

Florida Steel Corp. v. NLRB, 587 F.2d 735 (5th Cir. 1979) . 59

Fun Striders, Inc. v. NLRB, 658 F.2d 716 (9th Cir. 1981) . 51

Insurance Agents' International Union, 119 N.L.R.B. 768 (1957). 67

Iowa Beef Packers, Inc., 144 N.L.R.B. 615 (1963) 67

Keokuk Gas Service Co. v. NLRB, 580 F.2d 328 (8th Cir. 1978) . . 30

Lippincott Industries, Inc. v. NLRB, 661 F.2d 112 (9th Cir. 1981) 31

Local 357, Int'l Brotherhood of Teamsters v. NLRB, 365 U.S. 667 (1961) 17

Midwest Regional Joint Bd. Amalgamated Clothing Workers of America v. NLRB, 564 F.2d 434 (D.C. Cir. 1977) 30

Page

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 34

NLRB v. Charles H. McCauley Assoc., 657 F.2d 685 (5th Cir. 1981) . 48

NLRB v. Citizen-News Co., 134 F.2d 970 (9th Cir. 1943) 20

NLRB v. Collier, 553 F.2d 425 (5th Cir. 1977) 28

NLRB v. Colvert Dairy Products Co., 317 F.2d 44 (10th Cir. 1963) 61

NLRB v. Consolidated Freightways Corp., 651 F.2d 436 (6th Cir. 1981) 28

NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st. Cir. 1979) 37

NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) 11

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) 41

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 19

Page

NLRB v. Lloyd A. Fry Roofing Co., Inc., of Dela., 651 F.2d 443 (6th Cir. 1981) 49

NLRB v. Lowell Sun Publishing Co., 320 F.2d 835 (1st. Cir. 1963) . 27

NLRB v. Montgomery Ward & Co., Inc., 554 F.2d 996 (10th Cir. 1977) 27

NLRB v. Nevis Industries, 647 F.2d 905 (9th Cir. 1981) . . . 28

NLRB v. Publishers Printing Co., 625 F.2d 746 (6th Cir. 1980) . 26

NLRB v. Robin American Corp., 654 F.2d 1022 (5th Cir. 1981) 28

NLRB v. Rockwell Manufacturing Co., 271 F.2d 109 (3d Cir. 1959) . . 59

NLRB v. Standard Coil Prods. Co., 224 F.2d 465, cert. denied, 350 U.S. 902 (1955) 19

Neptune Water Meter Co. v. NLRB, 551 F.2d 568 (4th Cir. 1977) . 29

Peavey Co. v. NLRB, 107 L.R.R.M. 2359 (7th Cir. 1981) 50

Page

Proctor & Gamble Mfg. Co. v. NLRB, 658 F.2d 968 (4th Cir. 1981) . . 46

Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626 (5th Cir. 1981) 48

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 39

The Youngstown Osteopathic Hospital Association, 224 N.L.R.B. 574 (1976) 26

TRW, Inc. v. NLRB, 654 F.2d 307 (5th Cir. 1981) 32

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 25

Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90 2d Cir. 1978) 29

Western Exterminator Co. v. NLRB, 565 F.2d 1114 (9th Cir. 1977) 28

Wyman-Gordon Co., 62 N.L.R.B. 561 (1945) 21

STATUTES

	Page
Administrative Procedure Act	
§5 U.S.C. §7(c)	38
National Labor Relations Act	
29 U.S.C. §8(a)(3)	15
29 U.S.C. §8(c)	54
29 U.S.C. §10(c)	16
NLRB Regulations	
29 C.F.R. §101.10(b)	38

LEGISLATIVE MATERIALS

S. Rep. No. 573, 74th Cong., 1st. Sess. (1935)	18
H.R. Rep. No. 1147, 74th Cong., 1st. Sess. (1935)	18
H.R. Rep. No. 245, 80th Cong., 1st. Sess. (1947)	22
H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947) . . .	22
93 Cong. Rec. 6959-60 (1947) (remarks of Sen. Taft) . . .	57

MISCELLANEOUS

	Page
Cox, Some Aspects of the Labor Management Relations Act of 1947, 61 Harv. L. Rev. 1 (1947)	18
Irving, Prosecutorial Discretion Under the National Labor Relations Act, Labor Law Developments 1978 (24th Ann. Inst., Sw. Legal Found.) 129 (1978)	68
NLRB General Counsel Memorandum 80-58 (Nov. 4, 1980), reprinted in 223 Daily Labor Rep't A-7 (Nov. 17, 1980) . .	45
Truesdale, Remarks, Labor Law & Labor Management Relations Conference in Columbia, Mo., 4 LAB L. REP. (CCH) ¶9239 (Oct. 3, 1980)	71

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-987

WRIGHT LINE, a Division of
WRIGHT LINE, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

On Petition For A Writ Of Certiorari To
The United States Court of Appeals
For The First Circuit

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE*

The Council on Labor Law Equality ("COLLE") is a national association of

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*Pursuant to Rule 36.2 of the Rules of this Court, written consents of the parties to the filing of this brief have been obtained and have been lodged with the Clerk of the Court.

large and small employers that has, as its single purpose, the responsibility of monitoring the activities of the National Labor Relations Board and related questions arising under the NLRA and giving support to those cases or issues that affect a broad section of industry. COLLE was formed in recognition of the importance of the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the interpretation of national labor policy.

Wright Line's Certiorari petition presents the Court with an opportunity to resolve one of the most vexing issues that confront employers. The conflict that existed in the circuits prior to the Board's decision in Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980), has not abated.

The First Circuit's review of the Wright Line decision is in conflict with the views of other circuits on the question of whether the Board's General Counsel can establish a violation of Section 8(a)(3), the discriminatory discharge prohibition of the Act, without proving that union animus was the employer's dominant motive and also without bearing the burden of proof. The uncertainty created by the widely divergent views of the circuit courts on this issue and the need for the resolution of this conflict at this time are of paramount importance to large and small employers. It has been the congressional design since the original Wagner Act was amended in 1947 that employers have a right to discipline an employee "for cause" without jeopardy of being required to prove that arguable concurrent protected and concerted activity of the

employee was not the reason for the disciplinary action.

The other issue presented in this case is also compelling to members of COLLE, because the First Circuit failed to follow this Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), by erroneously considering statements protected under Section 8(c) of the Labor Act as proof of union animus in satisfaction of the Board's newly created burden of proof. The Petition for Certiorari presents the important question of whether the Board may meet this newly created burden by utilizing protected employer conduct.

COLLE has selected the First Circuit's Wright Line decision as the first case in which to file a friend of the court brief, because of the overriding importance of these issues in maintaining a balanced national labor policy consistent with congressional design.

SUMMARY OF THE ARGUMENT

This case presents a recurring question of significance to employers generally, involving both their statutory right to discharge employees for cause and their constitutional and statutory right to freely express their views concerning the possible unionization of their work forces. Furthermore, there has been and

continues to be widely divergent split of authority among and within the several circuit courts of appeals concerning the proper test of employer motivation[1]

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[1]In the case at bar, the First Circuit accepted the Board's new "motivating factor" test, which the court read as a "but for" test but which the Board in actual practice treats as an "in part" test. The court rejected the Board's attempt to shift the burden of proof to the employer. In general accord with the First Circuit is the Fourth Circuit, Proctor & Gamble Mfg. Co. v. NLRB, 658 F.2d 968 (4th Cir. 1981).

The Fifth Circuit is itself split. Several panels endorsed the Board's Wright Line approach, Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626 (5th Cir. 1981), but another panel applied a "moving cause" test and kept the burden on the Board's General Counsel. The Sixth Circuit is similarly split. Compare NLRB v. Consolidated Freightways Corp., 65 F.2d 436 (6th Cir. 1981) (adopting Wright Line) with Charge Card Ass'n v. NLRB, 653 F.2d

and the proper immunity to be accorded non-coercive employer speech.

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272 (6th Cir. 1981) (burden on General Counsel to show dominant motive).

The Seventh and Ninth Circuits approve Wright Line. Peavey Co. v. NLRB, 107 L.R.R.M. 2359 (7th Cir. 1981); NLRB v. Nevis Industries, 647 F.2d 905 (9th Cir. 1981) (but Ninth Circuit still applies "dominant cause" motive test).

Circuit courts which rejected the Board's old "in part" analysis but which have not spoken on the subject since the Wright Line decision are the Second, Third, Eighth and District of Columbia Circuits. Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90 (2d Cir. 1978) ("but for" test); Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363 (3d. Cir. 1978) ("real motive" test); Keokuk Gas Service Co. v. NLRB, 580 F.2d 328, 335 (8th Cir. 1978) ("but for"); and Midwest Regional Joint Bd. Amalgamated Clothing Workers of America v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977) ("but for"). See pages 39-46, infra, for an analysis of this split of authority.

Section 10(c) of the Labor Management Relations Act recognizes an employer's right to discipline or discharge employees for cause. Consequently, only such decisions which are made on the basis of union activity and not for cause are unlawful under Section 8(a)(3) of the Act. The legal animus standard legislated by Congress thus requires identification of the employer's "true purpose" or "dominant motive" in taking the action complained of. In the past the National Labor Relations Board has nullified management's express right to discharge for cause by asserting that it can establish a Section 8(a)(3) violation merely by showing that a part, however small, of the employer's

motive was union animus. This "in part" test is not authorized by Congress and is inconsistent with the Congressional intent evidenced by Section 10(c).

In the case at bar, the Board has recast its "in part" test as a "motivating factor" test (while reaffirming the principles underlying the old test) and has ruled that, once the General Counsel makes a prima facie showing that employee protected activity was a "motivating factor" in the employer's decision, the burden shifts to the employer to prove that he would have acted the same even in the absence of the protected activity. Such a shift in the burden of proof contravenes the provisions of Section

10(c) of the Act and Section 7 of the Administrative Procedure Act, both of which require the General Counsel to bear the burden of proof. The Board lacks authority to repeal this Congressional judgment.

The United States Court of Appeals for the First Circuit rejected the Board's attempt at burden shifting. However, the First Circuit erred by favoring the Board's "motivating factor" motive test over the Congressionally-mandated "dominant motive" test. The First Circuit also rendered any burden on the General Counsel largely illusory by allowing him to meet that burden by relying on evidence of lawful employer campaign statements to

create an inference of unlawful union animus. Such evidentiary use of lawful employer speech activity violates employer rights under the First Amendment and under Section 8(c) of the Act and is not in accord with this Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). Not only does such use of protected Section 8(c) speech improperly dilute the General Counsel's statutory burden of proof, but it also constitutes an impermissible burden and chill on employer expression. Several of the circuit courts have recognized this.[2]

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[2]See, e.g., Coppus Eng'r Corp. v. NLRB, 240 F.2d 564, 571 (1st Cir. 1957); NLRB v. Rockwell Mfg. Co., 271 F.2d 107,

The case at bar thus presents an opportunity to harmonize the law of the circuits concerning serious problems of constitutional and statutory dimensions in an important area of labor-management relations. The extensive split of authority among the several circuit courts of appeals on dual motive discharge tests which existed before the Board's decisions in the instant case continues unabated. The decision of the First Circuit differs substantially from that of the Board concerning burden of proof, and there is no indication that the Board will hew to

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118-19 (3d Cir. 1959); Dow Chemical Co., Texas Div. v. NLRB, 660 F.2d 637, 644 (5th Cir. 1981); NLRB v. Colvert Dairy Prods. Co., 317 F.2d 44, 46 (10th Cir. 1963).

the line established by the First Circuit. The Board's General Counsel persists in the view that proof that union animus was a "motivating factor," no matter how small, will establish a violation of Section 8(a)(3) unless the employer is able to prove that he would have discharged the employee in any event.

REASONS FOR GRANTING THE WRIT

I. The Circuit Courts Are Divided On Whether The Board's General Counsel can Establish A Violation of Section 8(a)(3) Without Proving That Union Animus Was The Employer's Dominant Motive

The various courts of appeals are divided concerning the important question of what test of employer motivation should

be required in order to prove a discriminatory discharge in violation of Section 8(a)(3) of the Act, 29 U.S.C. §158(a)(3), as well as the question of who should bear the burden of such proof. The interrelationship between the employer's Section 8(a)(3) obligation not to discriminate and his Section 10(c) right to discharge for cause has spawned a great deal of confusion throughout the courts. In order to explicate the nature and extent of this conflict of authority, it is necessary to examine in some detail the manifest intent of Congress, the Board's development of its partial motivation test, the general rejection of that test by most circuit courts, the Board's facial

revision of the same test in the case at bar, and the continuing opposition of several circuit courts to the position taken below by the Board and by the First Circuit.

A. Congress intended that the Board inquire into the Employer's real motive for discharge

Whenever an employer discharges or disciplines an employee for cause, that action lies at the intersection of two distinct national labor policies. Section 8(a)(3) of the Act, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or

discourage membership in any labor organization." On the other hand, the Act also recognizes the employer's right to discharge an employee for cause.[3] In a "mixed motive" or "dual motive" discipline case, where the employer has a "good reason" for lawfully disciplining and allegedly also has a "bad reason" violative of Section 8(a)(3), it becomes necessary to measure the employer's

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[3]Section 10(c) of the Act, 29 U.S.C. §160(c), provides:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

motivation in order to strike the proper balance between protection of the employee's Section 7 rights and protection of the employer's Section 10(c) right.

Section 8(a)(3) of the National Labor Relations Act prohibits employer discrimination in hiring or tenure of employment on the basis of union activity. In the 1935 enactment of this provision, Congress rejected an effects standard and required inquiry into motive. Associated Press v. NLRB, 301 U.S. 103, 132 (1937) (Labor Act "forbids discharge for what has been found to be the real motive" of the employer); Local 357, Int'l Brotherhood of Teamsters v. NLRB, 365 U.S. 667, 675 (1961) ("It is

the 'true purpose' or 'real motive' in hiring or firing that constitutes the test."). See also Cox, Some aspects of the Labor Management Relations Act of 1947, 61 Harv. L. Rev. 1,21 (1947) (employer's motive decisive). By engrafting a motive requirement upon section 8(a)(3), Congress specifically preserved management's common law right "to select their own employees or to discharge them." H.R. Rep. No. 1147, 74th Cong., 1st. Sess. 19 (1935). Accord: S. Rep. No. 573, 74th Cong., 1st Sess. 11 (1935) ("Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him

for failure to perform"). NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937) ("The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them"). As the First Circuit stated in NLRB v. Standard Coil Prods. Co., 224 F.2d 465, 470, cert. denied, 350 U.S. 902 (1955):

> It is well accepted law that an employer may discharge an employee for any reason, reasonable or unreasonable so long as it is not for a reason prohibited by the Act.

Earlier the Ninth Circuit observed:

> It should be emphasized that the right to terminate a contract of employment is a constitutional right of the utmost importance. The mere discharge of an employee with or without reason is, therefore, not

> evidence of intent to affect labor unions or rights of employees under the (Act).

NLRB v. Citizen-News Co., 134 F.2d 970, 973 (9th Cir. 1943).

Congress preserved the common law managment prerogative to maintain an efficient and productive work force and it impinged upon this broad right only where it could be shown that employment practices were intended to reward or penalize union activity. However, the Board neutralized this employer right to a considerable extent by inferring that if the employee's protected activities played any part, however small, in the employer's decision, then union advocacy was the "reason" for the discharge. See, e.g.

Wyman-Gordon Co., 62 N.L.R.B. 561 (1945); Columbia Prods. Corp., 48 N.L.R.B. 1452 (1953).

Because of widespread dissatisfaction with this assumption of undelegated authority, Congress in 1947 amended Section 10(c) of the Act to state specifically that discharges for cause are beyond the Board's authority to prohibit. The House Labor Committee stated:

> The change . . . is intended to put an end to the belief . . . that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilties and other disorders and misconduct. . . . The Board may not "infer" an improper motive when the evidence shows cause for discipline or discharge.

H.R. Rep. No. 245, 80th Cong., 1st Sess., 42-43 (1947).

The Conference Report noted that under Section 10(c):

> employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, . . . or for other cause [interfering with war production] . . . will not be entitled to reinstatement.

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947).

Two additional restrictions upon the Board's discredited "inference" drawing were added to Section 10(c) and Section 10(e). Congress amended Section 10(c) to require the Board to predicate its unfair

labor practice findings on a "preponderance of the testimony" rather than the 1935 Wagner Act's "all the testimony" standard. H.R. Conf. Rep. No. 510, 80th Cong., 1st. Sess. 53-4, 56 (1947). Congress believed the Wagner Act standard permitted the Board too easily to justify discriminatory discharges from selected portions of the record or to fashion a Section 8(a)(3) violation based solely upon multiple inferences. This statutory amendment was intended to eliminate these practices.

In Section 10(e) of the Act, Congress reinforced the increased quantum of evidence standard added to Section 10(c) by substituting a stiffer "substantial

evidence" judicial review standard for the virtually rubber stamp "supported by the evidence" standard of the Wagner Act. Congress gave federal circuit courts "a real power to review" so they could insure agency adherence to the greater substantive violation requirement. Id. at 56. Congress specifically disapproved the Board's "partial motive" decisions in Wyman-Gordon Co., supra, and Columbia Prods. Corp., supra, and stated that the foregoing amendments should preclude similar results in the future. Id. at 56. "Congress expressed a mood . . . that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the

reasonableness and fairness of Labor Board decisions . . ." Universal Camera Corp. v. NLRB, 340 U.S. 474, 487, 490 (1951).

B. The Board's "In Part" Analysis Has Been Rejected by Many Circuit Courts

Although the will of Congress, embodied in the 1935 Act and the 1947 amendments, rejects a "partial motive" analysis, the Board has continued along that path in dual motive cases, ignoring the Congressional intent and generating a serious split of authority among the reviewing circuit courts. Until its Wright Line decision, the Board openly applied an "in part" motivation test, which finds a violation of the Act

whenever a discharge is motivated, at least in part, by the employee's protected activities, even if the employer also relied upon a legitimate business reason. See, e.g., The Youngstown Osteopathic Hospital Association, 224 N.L.R.B. 574, 575 (1976). The Board's "in part" test was not universally accepted by the circuit courts. The "in part" test has been applied by the Sixth Circuit, NLRB v. Publishers Printing Co., 625 F. 2d 746, 749 (6th Cir. 1980);[4] by the Seventh

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[4]But see NLRB v. Consolidated Freightways Corp., 651 F.2d 436, 437 (6th Cir. 1981) (the proper test is "whether the anti-union animus was a dominant motive"). See also Charge Card Ass'n v. NLRB, 653 F.2d. 272, 275 (6th Cir. 1981) ("dominant motive" the proper test).

Circuit, Chicago Magnesium Castings Co. v. NLRB, 612 F.2d 1028, 1034 (7th Cir. 1980) (rejecting the "but for" test); and by the Tenth Circuit, NLRB v. Montgomery Ward & Co., Inc., 554 F.2d 996, 1002 (10th Cir. 1977).

The First Circuit led the criticism of the Board's in-part test and instead focused on whether union animus was the "dominant motive" in the employer's decision to discharge the employee. NLRB v. Lowell Sun Publishing Co., 320 F. 2d. 835 (1st Cir. 1963); Colletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977).

The "dominant motive" test has also been applied by the Sixth Circuit, NLRB v.

Consolidated Freightways Corp., 651 F.2d 436, 437 (6th Cir. 1981); and by the Ninth Circuit, Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 n. 3 (9th Cir. 1977); NLRB v. Nevis Industries, 647 F.2d 905, 909 (9th Cir. 1981) ("dominant or motivating cause").

The Fifth Circuit tests for the "motivating factor," NLRB v. Collier, 553 F.2d 425, 428 (5th Cir. 1977); NLRB v. Robin American Corp., 654 F.2d 1022 (5th Cir. 1981).

The "but for" standard requires the Board to determine whether the employer would have discharged the employee anyway, without regard for his union activity. If the employee would not have been

discharged, but for his protected activity, there has been an 8(a)(3) violation.[5] The "but for" test has been applied by the Second Circuit, Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978); by the Fourth Circuit, Neptune Water Meter Co. v.

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[5]This is the test the circuit court below believes the Board to be applying in the case at bar, a test drawn from Mt. Healthy v. Doyle, 429 U.S. 274 (1977). [A 14-15]. [Such references indicate pages in the Appendix to the Petition for Writ of Certiorari.] However, the Board refuses to disavow its "in part" principles [A 45] and Member Jenkins reads Mt. Healthy as adopting the "in part" test [A 51] which has been so unsatisfactory.

NLRB, 551 F.2d 568 (4th Cir. 1977); by the District of Columbia Circuit, Midwest Regional Joint Bd. Amalgamated Clothing Workers of America v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977); and by the Eighth Circuit, Keokuk Gas Service Co. v. NLRB, 580 F.2d 328, 335 (8th Cir. 1978). A practically indistinguishable test inquires into the employer's "real motive"; this seems to be the "but for" test in all but name and has been adopted by the Third Circuit, Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978).

Contributing to the confusion in this area are the variety of tests of employer motivation, the variety of names given to

those tests, and the loose manner in which those names are intermingled in the cases. Some of the terms seem to mean different things to different courts. For example, in the Ninth Circuit the focus is said to be on the "dominant or moving cause," NLRB v. Nevis Industries, 647 F.2d 905 (9th Cir. 1981). But Nevis endorsed the Board's Wright Line test, which the Board apparently considers consistent with its old "in part test." [A 45]. To further confuse things, in Lippincott Industries, Inc. v. NLRB, 661 F.2d 112 (9th Cir. 1981), the Ninth Circuit speaks of "the moving cause, or but for cause." Id. at 115. "But for" is generally viewed as a separate test. See, e.g., Neptune Water

Meter Co. v. NLRB, 551 F.2d 568 (4th Cir. 1977). The general imprecision in the use of these terms is exemplified in TRW, Inc. v. NLRB, 654 F.2d 307 (5th Cir. 1981), where the Administrative Law Judge pronounced:

> So finding, I conclude, that but for the Kendrick incident, Garza would not have been discharged. Respondent's dominant motivation thus being, at least in part, unlawful, I find that Garza's discharge was a violation of Section 8(a)(3) of the Act.

Id. at 311 n.2. (emphasis added).

C. The Board's "Wright Line" Test Perpetuates Its Discredited "In Part" Analysis

Section 8(a)(3) questions arise constantly throughout the workforce.[6]

[6]In fiscal 1979, 59.3% of all unfair labor practice charges filed

As the Board itself noted in its decision in the case at bar, "in an area fundamental to the Act, namely, Section 8(a)(3), disagreement and controversy are rampant among the various decision-making bodies." [A 35]. In an effort to create order out of chaos, the Board developed its new "Wright Line test" for dual motive cases. However, the Board's efforts were largely cosmetic. The Board affects to modify its "in part" test by nominally adopting the reasoning of this Court's

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against employers were §8(a)(3) charges of illegal discharge or other discrimination. 44th NLRB Annual Report, at 10 (1980).

decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Where formerly the General Counsel was required to show only that the employer's action was motivated "in part" by the employee's protected activity, the General Counsel will now be required to show that the protected activity was a "motivating factor" in the employer's decision. [A 44]. However, the Board indicates that in abandoning the phrase "in part" it is not repudiating the principles and concepts it has applied in the past. [A 45]. In his concurring opinion, Member Jenkins equates the Mt. Healthy test with the "in part" test. [A 51]. This evidences an adoption of Mt.

Healthy in name only, since this Court was careful in that case to fashion a test which avoided according the employee who exercises protected conduct any more deference than is accorded other employees:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . .
>
> The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.

429 U.S. at 285-86 (emphasis added).

Surely the statutory Section 7 rights are similarly vindicated without resort to an "in part" standard which would elevate the union adherent on a pedestal above his fellow employees.

Furthermore, the "motivating factor" test developed by this Court in Mt. Healthy, a case of government discrimination based upon an employee's exercise of a constitutional right, is inappropriate in a dual motive discharge unfair labor practice context because tne dominant motive test is the only one consistent with the intent of Congress in amending Section 10(c) in 1947: "the Board may not 'infer' an improper motive when the evidence shows cause for

discipline or discharge." H.R. Rep. No. 245, 80th Cong., 1st Sess., 43 (1947).

D. The Board's Attempt to Shift The Burden of Proof to the Employer Violates the Act and the Administrative Procedure Act and Misapplies This Court's Mt. Healthy and Great Dane decisions

The portion of Mt. Healthy which the Board has more sincerely embraced than the "motivating factor test" is the concept of shifting the burden of proof once the employee (or the General Counsel) has made out his prima facie case. In Mt. Healthy, this Court required the employer to prove that it would have refused to rehire the employee even in the absence of the protected conduct. In attempting to shift

the burden from the General Counsel, the Board departed from precedent, Campbell & McLean, Inc., 118 N.L.R.B. 967 (1957), and ignored both the mandate of Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 7(c), that "the proponent of a rule or order has the burden of proof," and the requirement of its own regulations that the General Counsel bear the burden of proof. 29 C.F.R. §101.10(b)(1977). The Board's creation of a burden of innocence which it thrusts upon the employer is contrary to the intent of Congress in the Administrative Procedure Act and in the Wagner Act as amended in 1947, and contrary to uniform federal court and Board decision and the Board's own Rules and Regulations.

Imposition of an identical evidentiary burden of persuasion upon employers in cases involving race, sex, religious or national origin discrimination under Section 703(a) of the 1965 Civil Rights Act has been twice rejected by this Court. In Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978), this Court emphasized that the employer could not be required to prove the absence of discriminatory motive. In Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), this Court unanimously rejected the Fifth Circuit's view that if a prima facie Section 703(a) violation is in

evidence the employer must prove by a preponderance of the evidence "which . . . would persuade the trier of fact" that he acted lawfully for legitimate, non-discriminatory reasons. This is precisely the evidentiary shift the Board is attempting to create in this case. "[T]he burden (of proof and persuasion) will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." (A 32). Burdine rejected this approach and held that the employer has only a burden of producing evidence of a non-discriminatory reason. This Court specifically held that the burden of proof and the burden of persuasion remain upon

the Title VII plaintiff during all stages of the trial.

The Board has argued [A 41-42] that this Court has implicitly sanctioned its shifting of the burden onto the employer in Section 8(a)(3) cases by its decision in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). Such is not the case, and the Board's invocation of Great Dane manifests a fundamental misunderstanding of the issue presented in that case. In Great Dane, an employer had discriminated against strikers by denying them accrued vacation pay while paying it to non-strikers. The question addressed by this Court was whether, given such discrimination, proof of anti-union motive was also

required to establish a violation of Sections 8(a)(3) and (1). The fact of discriminatory treatment was never seriously at issue.[7] Thus, Great Dane deals only with proof of motive once discrimination has been proved. This Court clearly held:

> [O]nce it has been proved that the employer engaged in discriminatory conduct . . . the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Id. at 34 (emphasis added).

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[7]The Court observed: "There is little question but that the result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form." Id. at 32.

But in the case at bar, as in any dual motive discharge case, the fact of discrimination--which was a given in Great Dane--is precisely the issue which has yet to be decided. Whereas this Court in Great Dane knew that that employer had treated strikers differently from employees who had not engaged in protected activity, the Board or a reviewing court in a dual motive discharge case initially knows only that the employer has discharged a particular employee. Whether that discharge constituted anti-union discriminatory treatment remains to be proved.[8] Thus, the situation is

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[8]And, of course, "it is up to the Board to prove a case and not up to the

fundamentally different and the Great Dane principle is not applicable. Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1117 n. 2 (9th Cir. 1977). Accord, NLRB v. Wright Line, slip. op. 10 n.8 (1st Cir. 1981) [A 10] ("Great Dane has no application").

The circuit court below parted company with the Board on the issue of this attempt by the Board to shift the burden of proof from the General Counsel to the charged employer. The First Circuit properly held that Section 10(c) of the Act, 29 U.S.C. §160(c), requires

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respondent to disprove it." NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 673 n. 16 (1st Cir. 1979).

that the General Counsel prove his case by a preponderance of the evidence and that he retains the burden of proof at all times.

The Board, however, continues to adhere to its view that the burden does shift to the employer. See General Counsel Memorandum 80-58 (Nov. 4, 1980), reprinted in 223 Daily Labor Rep't A-7 (Nov. 17, 1980) ("if the employer fails to establish his affirmative defense, the General Counsel will prevail, regardless of the quantum of unlawful motivation involved.") Unless this Court accepts this case, the Board will continue to apply the partial motivation test and will

continue to shift the burden of proof to the charged party.

E. The Circuit Courts Remain Divided Concerning The Proper Test to be Applied In Dual Motive Cases

In the period since the Board created its "Wright Line test," it has received mixed reviews from the circuit courts. In the case at bar, the First Circuit has modified the Board's Wright Line test by keeping the burden of proof where it belongs--with the General Counsel.

In Proctor & Gamble Mfg. Co. v. NLRB, 658 F.2d 968 (4th Cir. 1981), the Fourth Circuit held that, once an employer has come forward with evidence of a legitimate

and substantial business justification for disciplining the employee, the burden is on the Board to find "an affirmative and persuasive reason why the employer rejected the good reason and chose a bad one." Id. at 980, quoting NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st. Cir. 1968). This differs from the Board's Wright Line test but approximates the First Circuit's Wright Line test.

In the Fifth Circuit, there has been a conflict of authority between the circuit's sub-units.[9] Several panels

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[9]Until recently, the Fifth Circuit had been divided into two Administrative units (A and B), each of which constituted a separate court for purposes of en banc hearings. 5th Cir.

in Unit B have adopted the Board's Wright Line analysis. Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626 (5th Cir. 1981); NLRB v. Charles H. McCauley Assoc., 657 F.2d 685 (5th Cir. 1981); NLRB v. Robin American Corp., 654 F.2d 1022 (5th Cir. 1981). However, Unit A of the Fifth Circuit has ruled that once an employer has articulated a legitimate business reason for his action, the burden is on the General Counsel "to present substantial evidence that anti-union

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Judicial Council Resol. (Jan. 14, 1981). Thus, a split between Unit A and Unit B of the Fifth Circuit corresponded to a split between circuit courts in its effect on uniformity. Pub. L. 96-452, 94 Stat. 1994 (1980), effective October 1, 1981, created the Eleventh Circuit out of the former Unit B of the Fifth Circuit.

animus was the 'moving cause' of the disciplinary measures." TRW, Inc. v. NLRB, 654 F.2d 307, 310 (5th Cir. 1981). Contra, Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626 (5th Cir. 1981).[10]

In the Sixth Circuit, the Board's Wright Line burden shifting test has been adopted in NLRB v. Consolidated Freightways Corp., 651 F.2d 436 (6th Cir. 1981) (though the court also held that the proper quantum test is "whether the anti-union animus was a dominant motive") and in NLRB v. Lloyd A. Fry Roofing Co. Inc.,

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[10]The intramural split between Fifth Circuit units over the Wright Line test thus suggests a split between the new Eleventh Circuit and the Fifth Circuit's TRW, Inc. decision.

of Dela., 651 F.2d 443 (6th Cir. 1981). But in Charge Card Ass'n v. NLRB, 653 F.2d 272 (6th Cir. 1981), another panel held that the proper mixed motive test is a dominant motive test and that the General Counsel has the burden of showing that, absent union activities, the employee would not have been discharged. The Charge Card court took note of the Board's Wright Line rule but did not apply it, holding that there was insufficient evidence under either a Wright Line or dominant motive analysis.

The Seventh Circuit has adopted the Board's Wright Line burden shifting test. Peavey Co. v. NLRB, 107 L.R.R.M. 2359 (7th Cir. 1981).

The Ninth Circuit approves Wright Line, NLRB v. Nevis Industries, 647 F.2d 905 (9th Cir. 1981), while simultaneously reaffirming the "dominant or moving cause" test (which is not the Board's reading of Mt. Healthy or Wright Line). 647 F.2d at 909. Meanwhile, in a Section 8(a)(1) discharge case, the Ninth Circuit has recently held that once the employer demonstrates a legitimate substantial business reason for the dismissal, the burden shifts to the Board to show that the employer's "primary motivation" was to penalize the employee for his protected activity. Fun Striders, Inc. v. NLRB, 658 F.2d 716 (9th Cir. 1981).

Thus, the current state of the law regarding "dual motive" discharges remains, as the Board indicated below [A 32], "a picture of confusion and inconsistency." The Board gives lip service to Mt. Healthy but does not disavow its earlier "in part" test, while seeking to shift the burden of proof to the employer. The First Circuit, while enforcing the Board's order in this case, rejected the Board's burden-shifting approach and read Mt. Healthy as a "but for" test. There is now a clear split of authority regarding the Board's "new" test and some circuit courts which have consistently rejected the Board's old "in part" test now have accepted a thinly disquised version while

continuing to espouse a dominant motive test.

II. The Circuit Court's Use Of The Employer's Campaign Position To Buttress the Finding Of An Unfair Labor Practice Penalizes Protected Speech and Conflicts With Decisions of Other Courts Of Appeals

In addition to the importance of and conflict concerning the issues of motivation test and burden of proof, there exist other grounds for this Court to grant the writ and take up this case at this time. By making evidentiary use of Wright Line's lawful, noncoercive campaign speech to prove unlawful union animus, the circuit court below ignored this Court's teaching in NLRB v. Gissel Packing Co.,

395 U.S. 575 (1969) and violated the employer's rights under the First amendment and under Section 8(c) of the Act. The importance of this issue in itself justifies granting the writ, but additional impetus is provided by the fact that the First Circuit's decision on this issue conflicts with the law established by the Third, Fifth and Tenth Circuits.

In Gissel, this Court established that an employer's free speech right to communicate his views to his employees cannot be infringed by the Board. That conclusion is compelled not only by the First Amendment but also by Section 8(c) of the Act.[11] This Court held that

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[11] 29 U.S.C. §158(c), which provides:

"an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or promise of benefit.'" 395 U.S. at 618.

Despite this assurance of freedom, and despite the clear statement in Section

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> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Id. (emphasis added).

8(c) that an expression of opinion is not an unfair labor practice and shall not be evidence of <u>any</u> unfair labor practice, in the case at bar both the Board [A 48] and the circuit court [A 14] relied on Wright Line's campaign statements to support the notion that Wright Line management was hostile to Mr. Lamoureux. The campaign statements were unobjectionable in themselves, but the circuit court relied on them as background evidence. In 1947 Congress was concerned that the Board, as here, had been habitually using uncoercive statements of union hostility as evidence of other unfair labor practices. House Rep. No. 245, 80th Cong., 1st Sess. 8 (1947). Congress amended the Act to

preclude this Board practice by adding Section 8(c). House Conf. Rep. No. 510, supra, at 45; 93 Cong. Rec. 6959-60 (1947) (remarks of Sen. Taft). As the Fifth Circuit observed in Dow Chemical Co., Texas Div. v. NLRB, 660 F.2d 637, 644 (5th Cir. 1981), "§8(c) at an irreducible minimum protects the right of an employer to state its views, argument or opinion, and to make truthful statements of existing facts."

The circuit court and the Board relied in part on Wright Line's protected speech in making out their case against the employer. Calling this use "background" cannot minimize the constitutional impropriety and cannot disguise the fact

that the statute plainly says that such use shall not be made of protected speech. As the First Circuit itself recognized in Coppus Eng'r Corp. v. NLRB, 240 F.2d 564, 571 (1st Cir. 1957); "an employer's statement cannot be used as background material for the finding of an unfair labor practice where such statement falls short of restraint or coercion."

The Board's attempt here to create a prima facie case of unlawful motivation from election campaign propaganda and two other verbal phrases, which not only fall short of restraint or coercion but also were not even alleged to be grounds for setting aside the election, is barred by Section 8(c). Using protected expression

to build a case would make the Act's invitation to employer expression a trap. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 670 (1st Cir. 1979). Opposition to a union is not an unfair labor practice, Florida Steel Corp. v. NLRB, 587 F.2d 735, 753 (5th Cir. 1979) ("any company has a perfect right to be opposed to a union"); NLRB v. Rockwell Manufacturing Co., 271 F.2d 109, 118-19 (3d Cir. 1959). So long as the employer does not coerce the employees, Section 8(c) protects his remarks and no stigma whatsoever should attach to the employer's free speech activity.

Misuse by the Board and the court below of an employer's protected speech

has wide-ranging ramifications. In the numerous representation elections conducted every year,[12] the potential for misuse of lawful employer campaign statements in any subsequent unfair labor practice proceedings constitutes an intolerable chill on employers' exercise of their constitutional and statutory rights. Such evidentiary use is antithetical to the principles underlying the First Amendment and the Section 8(c) privilege, as the Tenth Circuit has noted:

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[12] In fiscal 1979, there were 7,266 elections in which employees voted for or against a bargaining agent. 44th NLRB Annual Report, at 17 (1980).

> The Act (Sec. 8(c)) specifically provides that privileged communications between employer and employee shall not be evidence of an unfair labor practice. To allow the privileged communications to become an instrument of destruction by indirection is to frustrate the right of free speech and the privilege of persuasion. Management cannot effectually attempt lawful persuasion if by so doing there is an ever-present penalty of "antiunion animus.". . .

NLRB v. Colvert Dairy Products Co., 317 F.2d 44, 46 (10th Cir. 1963). To so burden the employer's exercise of campaign speech is to exert the leverage of a Government agency to stifle any voice raised in opposition to unionism.

A. Allowing the General Counsel To Use Protected Speech To "Prove" Discriminatory Motive Improperly Lightens His Statutory Burden of Proof

A more pernicious effect of the misuse of Section 8(c) speech concerns its

interrelation with the motivation tests to be used in mixed motive cases. In the case at bar the circuit court rejected the Board's attempt to impose upon employers the burden of disproving an unfair labor practice charge and instead held that Section 10(c) of the Act requires the Board to prove the employer's guilt by a preponderance of the evidence. [A 9-10]. But if the General Counsel can prove up his prima facie case merely with evidence that the employer previously spoke out lawfully in opposition to union organization of his enterprise, then the

"burden" the General Counsel must bear is rendered an illusory one. Any time an employer lawfully contests an election he will sow the seeds of the General Counsel's prima facie case for a subsequent 8(a)(3) charge. In Section 10(c) Congress placed the burden of proof squarely upon the General Counsel. He should be required to meet that burden without destroying the Section 8(c) protection.[13]

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[13] As the Tenth Circuit emphasized:

> The right of management to freely express its views in opposition to unionization cannot be burdened by indirection and thus destroyed through technical rationalization. NLRB v. Colvert Dairy Products Co., 317 F.2d 44, 46-47 (10th Cir. 1963).

III. The Conflicts Over Motivation Test, Burden of Proof and Protected Employer Expression and The Likelihood of The Board's Continued Use of Its Own Test Warrant Resolution By This Court

The split of authority among the circuit courts which existed prior to the

The split of authority among the circuit courts which existed prior to the Board's pronouncement of its "Wright Line test" continues, although with some reshuffling of several circuits' positions. The Board's and First Circuit's willingness to turn protected employee speech into evidence, despite the

clear prohibition of Section 8(c) of the Act, conflicts with the positions taken by the Third, Fifth and Tenth Circuits.

But even if there were no split among the circuit courts on these issues, the questions are important enough and recurrent enough to recommend themselves to this Court's attention at this time. The Board's Wright Line shift of the burden of proof is not in keeping with the employment discrimination decisions of this court, nor with Section 10(c) of the Act or Section 7 of the Administrative Procedure Act. The First Circuit is wrong in applying the "but for" test rather than the "dominant motive test" compelled by Section 10(c). Although the circuit court

properly held that the burden of proof remains with the General Counsel at all times, the court then reduced that holding to a nullity in this particular application by allowing evidentiary use of the employer's protected Section 8(c) campaign statements, which rendered the burden on the General Counsel largely illusory. That use contravenes the First Amendment and Section 8(c) of the Act.

Furthermore, even if the circuit court's Wright Line test were deemed to have sufficiently cured the defects of the Board's Wright Line test, there is no indication that the Board is inclined to apply its test as modified by the First Circuit. The Board traditionally refuses

to accept rules of law pronounced by reviewing courts which differ from Board positions. As the Board explained in Insurance Agents' International Union, 119 N.L.R.B. 768, 773 (1957):

> It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise.

That policy has been reaffirmed repeatedly. See, e.g., Iowa Beef Packers, Inc., 144 N.L.R.B. 615 (1963) and the cases cited therein, id. at 616 n.2. (Held: Trial examiner's reliance on circuit court decisions contrary to Board

decisions "constitutes fundamental error." Id. at 616). In practice, then, the General Counsel will continue to apply the Board's Wright Line test, rather than the First Circuit's modification, even within the First Circuit.[14]

The current instructions from the Board's General Counsel to the staff throughout the country state that "if the

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[14] As former General Counsel John S. Irving, Jr. explained: Even though we know that we have little or no chance of getting these cases enforced, we will continue to issue complaints until and unless the Board change its mind or the Supreme Court settles the matter." Irving, Prosecutorial Discretion Under the National Labor Relations Act, Labor Law Developments 1978 (24th Ann. Inst., Sw. Legal Found.) at 129, 136 (1978).

employer fails to establish the affirmative defense [that his decision would have been the same even absent protected activity by the employee], the General Counsel will prevail, regardless of the quantum of unlawful motivation involved." General Counsel Memorandum 80-58 (Nov. 4, 1980), reprinted in 223 Daily Labor Rep't A-7 (Nov. 17, 1980) (emphasis added). This is nothing more than the rebirth of the "in part" test under a new name. The Board will continue to find violations of Section 8(a)(3) without requiring proof that discrimination for union activity was the employer's dominant motive, and the Board will continue to expect a charged party to

disprove the charge, rather than shouldering the burden which Congress deliberately placed on the Board's General Counsel.

Courts which have accepted the Board's Wright Line test have generally done so with a sigh of relief, believing that decision to be a real shift in the Board's position. For example, in the case at bar, the First Circuit observed "that the Board's new rule seems better than its old one." [A 6]. But, in truth, the Board's Wright Line test is the same old, vinegary wine in a new bottle. The General Counsel recognized this in his memo. Member Truesdale acknowledged as much in a public speech stating:

> Some readers of the Board's opinion in Wright Line will wonder what all the fuss is about. The case does not change the Board's traditional allocation of the burden of proof, nor is it likely to alter the standards by which the Board determines whether a litigant has carried its burden of proof.[15]

The Board is obligated under Section 10(c) to find a violation of the Act only upon the preponderance of the evidence. So far has the Board departed from that obligation that the General Counsel has instructed his people in the field that if the evidence of partial unlawful motive

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[15] Remarks, Labor Law and Labor-Management Relations Conference in Columbia, Mo., 4 LAB. L. REP. (CCH) ¶9239 (Oct. 3, 1980).

and the employer's evidence that he would have acted the same in any case are in equipoise, the employer will lose.[16]

It is the Board's unwarranted view of its authority and this unauthorized dilution of the General Counsel's burden which will govern the issuance of complaints in dual motive cases throughout the country, putting employers to the trouble and expense of disproving charges while the General Counsel avoids having to prove the

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[16] The General Counsel's Memo noted that "[I]t is important to note that the employer must show that a decision would have been the same in the absence of protected activity. A showing that the employer could have come to the same conclusion will not be sufficient to establish the affirmative defense. 223 Daily Labor Rpt. at A-8 n.5.

charges. Unless this court provides guidance at this time, the Board will persist in this grievous error.

CONCLUSION

For the foregoing reasons, we ask that the writ be granted.

Respectfully submitted,

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